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THE RETURN OF CONSTITUTIONAL FEDERALISM

LOGAN EVERETT SAWYER III[†]

ABSTRACT

The return of federalism to a prominent and hotly contested place in constitutional jurisprudence is one of the most important legal developments of the last half-century. But this Article argues that current explanations for the return of constitutional federalism are flawed in ways that distort our understanding of constitutional development and impoverish current debates over the judicial protection of state authority. Conventional jurisprudential approaches cannot explain why the Court in the 1970s began to turn away from long-established doctrinal principles and a decades-old theoretical justification for deference on federalism questions. Political approaches cannot explain why that shift originated with Justices associated with the political left.

This Article offers an explanation for the return of federalism to prominence in our constitutional law that ignores neither the Court's unique institutional norms nor the importance of political change outside the Court. Through a close examination of the first decision since the New Deal to invalidate an exercise of Congress's commerce power on federalism grounds—the 1976 decision in *National League of Cities v. Usery*—it shows how durable changes in American government and politics undermined the dominant jurisprudential justification for deference on federalism questions. As the consensus surrounding the political safeguards of federalism collapsed, the debate over constitutional federalism returned. By portraying constitutional development as a result of the interaction of jurisprudential norms and political change, this approach casts light on contemporary efforts to generate constitutional change and current debates over the value of constitutional federalism.

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INTRODUCTION

In the four decades following *Carter v. Carter Coal Co.*[1] in 1936, the Supreme Court did not strike down a single exercise of Congress's commerce power on federalism grounds.[2] The Court repeatedly and by wide margins upheld national regulation of what had been considered local economic and social issues: wage payments to local factory workers, wheat production on a family farm, and choice of customers in a

1. 298 U.S. 238 (1936).

2. Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 624 n.20 (1978).

mom-and-pop restaurant.[3] This nearly uniform support for judicial deference to Congress on federalism questions clearly ended in 1976 with the decision in *National League of Cities v. Usery*.[4] There, a narrow five-Justice majority invalidated an extension of the Fair Labor Standards Act to state and local governments on the grounds that principles of federalism prohibited Congress from using its commerce power to impair the ability of states "to structure integral operations in areas of traditional governmental functions."[5] That particular doctrine was abandoned less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*,[6] but, as Justices Rehnquist and O'Connor predicted in their *Garcia* dissents, *National League of Cities* marked the return of constitutional federalism.[7] In the nearly four decades since *National League of Cities*, there has been continuous and often fierce debate on the Court and in the law reviews over the Court's proper role in protecting federalism. Last year's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*)[8] is only the most recent example.[9]

The return of constitutional federalism is recognized as one of the most significant developments in constitutional law in the last forty years,[10] yet—as I argue below—a close examination of the decision that sparked that development indicates that conventional explanations for it are not just inadequate, but inadequate in ways that distort our understanding of constitutional development and impoverish current debates over the future of constitutional federalism. Those explanations either emerge from normative legal analysis or focus tightly on the role of con-

3. Katzenbach v. McClung, 379 U.S. 294, 302 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942). These decisions were unanimous or by convincing majorities.

4. 426 U.S. 833, 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

5. *Id.* at 852.

6. 469 U.S. 528 (1985).

7. *Id.* at 579 (1985) (Rehnquist, J., dissenting); *id.* at 580 (O'Connor, J., dissenting).

8. 132 S. Ct. 2566 (2012).

9. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 601–02 (2000) (striking down parts of the Violence Against Women Act of 1994); Alden v. Maine, 527 U.S. 706, 712 (1999) (holding that Article I of the U.S. Constitution does not allow Congress to subject nonconsenting states to private suits); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act of 1990); New York v. United States, 505 U.S. 144, 149 (1992) (striking down the Low-Level Radioactive Waste Policy Amendments Act of 1985 as an over-extension of congressional commerce power). The Court also used federalism arguments to justify striking down exercises of other kinds of congressional authority, including statutes justified by Congress's Fourteenth Amendment authority. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577–78 (2012); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360–61 (2001) (striking down part of the Americans with Disabilities Act of 1990 as an encroachment into states' sovereign immunity); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66–67 (2000) (affirming states' sovereign immunity under the Eleventh Amendment); Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Businesses v. Sebelius, 93 B.U. L. REV. 1, 47–50 (2013).

10. *See* Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1051–52 (2000).

servative politics.[11] The vast normative literature that debates whether the "judicial safeguards of federalism" are properly inferred from the Constitution includes claims that constitutional federalism returned because of insights into the proper interpretation of the relevant legal materials.[12] Opposed to these jurisprudential perspectives are political approaches, which emphasize either the politics of the Justices or the role the Court plays as a part of a larger political movement. On this view, constitutional federalism returned because it was effective camouflage for the efforts of some Justices to promote business interests and other conservative ends,[13] or because the political success of the "New Right" gave a series of Republican presidents the opportunity to appoint Justices who shared their party's opposition to federal power.[14]

Placing *National League of Cities* in its political and doctrinal context indicates, however, that neither of these approaches can convincingly explain the return of constitutional federalism. Jurisprudential explanations cannot explain why the majority in *National League of Cities* rejected a long-established theoretical justification for judicial deference to Congress and overturned a forty-year-old precedent that had been recently reaffirmed. Political explanations are unconvincing because the debate over constitutional federalism emerged before the New Right seized political power with the election of Ronald Reagan in 1980 and

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11. Minority explanations for the revival of constitutional federalism include Vicki Jackson's claim that the Court's primary concern was Congress's laxity in considering constitutional constraints in Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 145, 145–55 (2001), and that the decisions are aimed at protecting the docket of the federal courts in Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 134–37, 142 (2001).

12. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1311, 1323 (1997) [hereinafter Yoo, *Judicial Safeguards*]; *see, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 241–43 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 216–17 (2000); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779, 794 (1982); John O. McGinnis, *Continuity and Coherence in the Rehnquist Court*, 47 ST. LOUIS U. L.J. 875, 883–84 (2003); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 511 (2002); Robert F. Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV. 81, 87 (1981); John C. Yoo, *Judicial Review and Federalism*, 22 HARV. J.L. & PUB. POL'Y 197, 197 (1998) [hereinafter Yoo, *Judicial Review*]; Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 887–88 (2007).

13. *See, e.g.*, Herman Schwartz, *The States' Rights Assault on Federal Authority*, *in* THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 155, 155–60, 162–63, 165–67 (Herman Schwartz ed., 2002); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

14. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 158–60 (2007); Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution 1920–2000*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER (1920–) 127, 160–65 (Michael Grossberg & Christopher Tomlins eds., 2008); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004). For a description of the New Right, see Kim Phillips-Fein, *Conservatism: A State of the Field*, 98 J. AM. HIST. 723, 724–27 (2011).

originated with Justices who cannot be characterized as conservatives, including Hugo Black and William O. Douglas, two paragons of New Deal liberalism and stalwarts of the Warren Court.

Reconnecting *National League of Cities* to its jurisprudential and political context also provides an opportunity to present a new explanation for the return of constitutional federalism, one that tries to reveal the interaction of jurisprudential norms and political developments rather than reduce one to the other. In what follows, I argue that the return of constitutional federalism was caused by structural changes in American government and durable shifts in political debate that undermined a near uniform consensus that what was best known as the political safeguards of federalism thesis accurately described American government.[15] As that broad consensus crumbled, some close observers of the federal system rejected the political safeguards thesis's conclusion that broad judicial deference to Congress on federalism issues should be the norm. One such observer was Justice Lewis Powell, who then played a central role in pushing the Court to conclude that doctrinal tensions, which had existed in the Court's federalism jurisprudence for four decades, were a sufficient justification for striking down Congress's exercise of its commerce power in *National League of Cities*.[16]

I make this argument in four parts. The first part argues that traditional legal materials do little to explain the majority's opinion in *National League of Cities* (*NLC*), which rejected a doctrinal principle that had been established for forty years, an admittedly controlling precedent less than a decade old, and a theoretical justification for judicial deference on federalism questions—the political safeguards thesis—that had driven commerce clause jurisprudence for decades. I conclude that any solely jurisprudential explanation for *NLC* will be insufficient.

Part II argues that the political explanations for the return of constitutional federalism are not convincing either. Admittedly, every vote in the five to four majority came from a Republican appointee, four of those votes came from recent appointees of Richard Nixon, and the opinion was written by Nixon's third appointment, then-Justice Rehnquist.[17] However, that evidence is insufficient because concerns with limiting federal power emerged on the Supreme Court before Nixon's four appointments arrived and were expressed by Justices who cannot be characterized as supporters of Nixon, the New Right, or conservative politics more broadly. Most important are Hugo Black's opinions in *Younger v. Harris*[18] in 1971 and *Oregon v. Mitchell*[19] in 1970, which protected the

15. Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 556–58 (1954).

16. *See infra* Part IV.B.

17. The majority in *NLC* was composed of Powell (Nixon, 1972), Rehnquist (Nixon, 1972), Blackmun (Nixon, 1970), Burger (Nixon, 1969), and Stewart (Eisenhower, 1958).

18. 401 U.S. 37 (1971).

autonomy of state courts and state legislatures on the basis of "Our Federalism,"[20] and William O. Douglas's 1968 dissent in *Maryland v. Wirtz*,[21] which argued that the Court should strike down an exercise of Congress's commerce power on federalism grounds and blazed the doctrinal path the majority followed in *National League of Cities v. Usery*.[22]

Part III begins to provide an alternative explanation of *NLC* by showing how structural changes in American government and durable shifts in the political debate undermined the near-universal faith in the political safeguards thesis. From the mid-1950s to the mid-1960s, close observers of American government agreed that the political safeguards of federalism were producing effective, democratic governance. They saw a federal system characterized by shared authority that was both responding to majority will and helping the nation respond effectively to the challenges of the time, most importantly in the field of civil rights. By the late 1960s and early 1970s, however, that consensus had collapsed. The causes of that collapse included significant reforms in state government, systemic changes in federal elections, and the administrative dysfunction produced by some of Lyndon Johnson's Great Society programs. Of at least equal importance were durable changes in the political debate caused by the reorientation of the fight for civil rights from de jure to de facto segregation and Southern state governments' belated decision to oppose the lawless violence of racist segregationists. The convulsions caused by Vietnam and Watergate also contributed. As a result of these changes, a variety of observers concluded that the political safeguards did not, in fact, produce a democratic and effective distribution of authority between state and federal governments. Some of those observers then concluded that a judicial role in protecting the states was appropriate.

By examining the internal dynamics that produced the Court's decision in *National League of Cities*, Part IV argues that the same developments that convinced some close observers of the federal system that the political safeguards of federalism were insufficient also convinced the Court. Central to that argument is revealing the central role Justice Louis Powell played in the Court's decision-making process and his rejection of the political safeguards thesis. "One can argue" Powell wrote justifying his vote in *National League of Cities*, "that the states can 'trust' Congress not to go so far," but the statute at issue in the case disproved the claim: "the political muscle of organized labor outweighed" the opposition of "virtually every state and city in the nation" and "what appeared

19. 400 U.S. 112, 117–18 (1970).

20. *See, e.g.*, *Younger*, 401 U.S. at 44; *see also* Daniel v. Paul, 395 U.S. 298, 315 (1969) (Black, J., dissenting).

21. 392 U.S. 183, 201 (1968) (Douglas, J., dissenting), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

22. 426 U.S. at 851–55.

to be overwhelming local political views to the contrary."[23] Part IV further undermines political approaches by establishing that the replacement of Democratic appointee William O. Douglas with Republican appointee John Paul Stevens in 1975 at least changed a 6–3 vote to re-establish constitutional federalism into a 5–4 vote, and very nearly led to the opposite outcome: a 5–4 vote to reject constitutional federalism.

Part V summarizes my causal claim and contrasts it with other explanations for *NLC* and the return of constitutional federalism. A conclusion briefly considers the implications of this history for our understanding of constitutional change and contemporary debates over constitutional federalism. It argues this integrative explanation for the return of constitutional federalism is important because it provides a case study of constitutional change that neither ignores the Court's unique institutional norms nor the importance of political change outside the Court. It also undermines the suggestion that constitutional federalism is inherently conservative and that the contemporary partisan divide on those issues is thus inevitable and permanent. This Article thus provides indirect but important support for the efforts of scholars investigating how federalism can advance interests typically associated with the political left, which can only enrich the ongoing debate over the value of federalism in government and constitutional law.

I. *NATIONAL LEAGUE OF CITIES* IN JURISPRUDENTIAL CONTEXT

By placing the opinions in *NLC* in doctrinal and jurisprudential context, this part has two goals. The first is to establish that the political safeguards thesis had for decades generated a consensus on the Court that judicial deference to Congress on federalism questions was appropriate. The second is to challenge the implicit claims made in the vast normative literature on constitutional federalism that the Court's renewed concern with protecting state autonomy resulted from an improved understanding—or a new misunderstanding—of traditional legal sources.[24] As important as that literature is for some purposes, it does not provide a convincing way to explain why the debate over constitutional federalism returned in *NLC*. In addition to doubt that such approaches can answer

23. Conference Notes, Justice Lewis F. Powell, Jr., National League of Cities v. Usery, No. 74–878, at 70. (Mar. 4, 1976) (on file with the Washington and Lee University School of Law) [hereinafter Powell Papers].

24. CHOPER, *supra* note 12, at 175; Kramer, *supra* note 12, at 216–17; La Pierre, *supra* note 12, at 794–95; Yoo, *Judicial Safeguards*, *supra* note 12, at 1323; *see also* Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1165–66 (1977); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 856 (1999); Nagel, *supra* note 12, at 87–88; Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1067–70 (1977); Yoo, *Judicial Review*, *supra* note 12, at 197; Meyer, *supra* note 12, at 887–88.

what is an inherently historical question,[25] there is evidence that makes such a claim difficult. Although there was some doctrinal support for the decision in *NLC* in the tension between the Court's treatment of Congress's taxing power and its commerce power, that tension had existed for forty years without the Court feeling it needed to be resolved. In addition, the opinion had to overturn a forty-year-old precedent that had been relied upon only eight years earlier and reject a theoretical justification for deference—the political safeguards thesis—that had driven commerce clause doctrine for decades.

A. National League *in Doctrinal Context*

National League of Cities arose from amendments to the Fair Labor Standards Act of 1938 (FLSA). The original FLSA established a national minimum wage, mandated "time and a half" for overtime in many industries, and outlawed child labor.[26] But until 1966, the FLSA applied only to employees of private businesses. It did not regulate employees of the federal government, of state governments, or of state-controlled entities like state hospitals. In 1966, Congress began to chip away at this distinction by extending the FLSA to cover employees of state-run hospitals, some state educational institutions, and state and local transit authorities.[27] Following the 7–2 decision to uphold the 1966 Amendments in *Maryland v. Wirtz*,[28] Congress passed another set of amendments in 1974 that extended the FLSA to all state and local employees.[29] President Nixon vetoed those amendments. His veto message primarily argued that the amendments would create inflation by raising the minimum wage too quickly, but also briefly mentioned that the law had been opposed by the Advisory Commission on Intergovernmental Relations and was "an unwarranted interference with State prerogatives."[30] He later signed the extensions after Congress passed a second bill with veto-proof majorities.[31]

The National League of Cities, the National Governor's Conference, twenty states, and four cities sought to enjoin the application of the

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25. *See* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 480 (2001) (discussing shortcomings of jurisprudential explanations); *see also* PURCELL, *supra* note 14, at 158–59 (arguing that the text and history of the Constitution are insufficient to generate such insights on their own).

26. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206, 212 (1934 & Supp. IV 1938); *see also* United States v. Darby, 312 U.S. 100, 109–10 (1941).

27. Those 1966 Amendments to the FLSA were upheld in *Maryland v. Wirtz*, 392 U.S. 183, 185–88 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), discussed *infra* pp. 240–41.

28. *Id.*

29. Fair Labor Standards Amendments of 1974, S. 2747, 93d Cong. § 6(a)(2) (1974).

30. Richard Nixon, *The President's Message to the House of Representatives Returning H.R. 7935 Without His Approval (Sept. 6, 1973)*, 9 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1060, 1061 (1973).

31. Brief for Appellants at *83, *Nat'l League of Cities*, 426 U.S. 833 (No. 74-878), 1974 WL 175976, at *83.

1974 Amendments to states and local governments because the amendments violated federalism principles.[32] Plaintiffs did not deny that the amendments regulated commerce. Throughout the litigation they and everyone else accepted that the amendments regulated an activity that affected interstate commerce and that identical regulations of private parties were clearly constitutional.[33] The issues plaintiffs asked the Court to resolve were whether principles of federalism recognized by the Tenth Amendment and other provisions of the Constitution limited Congress's authority to use its commerce power to regulate the behavior of states and, if so, whether the 1974 Amendments violated those limits.[34] In other words, did the 1974 Amendments violate any immunity the states had against Congress's commerce power implied by the Constitution's federal system?

The doctrine controlling the answer to those questions was decades old. The most relevant decision was *United States v. California*,[35] decided in 1936.[36] In *California*, the Court considered whether the Federal Safety Appliance Act could be constitutionally applied to a railroad run by the State of California not for profit.[37] Arguing by analogy from intergovernmental tax immunity doctrine developed in the late nineteenth century, the State of California argued that the same principles of federalism that prevented the federal government from taxing instrumentalities of state governments also prevented the federal government from using its commerce power to regulate states when the state was performing a public function in its sovereign capacity.[38] Whenever states were acting in a governmental capacity, California argued, principles of federalism meant they were immune from regulation by Congress's commerce power just as they would be immune from its taxing power.[39]

Justice Stone's opinion for a unanimous Court was not helpful to the plaintiffs' cause. In fact, it rejected their primary argument outright. "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies," he concluded, "is not illuminating."[40] Intergovernmental tax immunity "is implied from the nature of our federal system"[41] while, for reasons he did not explain,

32. *Id.* at *82–83.
33. *See, e.g.*, *id.* at *41; Brief for Appellees at *17–18, Nat'l League of Cities v. Dunlop, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Nos. 74-878, 74-879), 1975 WL 173790, at *17–18.
34. Brief for Appellants, *supra* note 31, at *52–54.
35. 297 U.S. 175 (1936), *overruled by Garcia*, 469 U.S. 528.
36. *Id.* at 183–84.
37. *Id.* at 183.
38. *Id.*
39. *Id.*
40. *Id.* at 184.
41. *Id.*

"there is no such limitation upon the plenary power to regulate commerce."[42]

But an opening remained for plaintiffs because the difference between the Court's treatment of Congress's commerce and taxing powers remained unexplained, even after the Court altered its intergovernmental tax immunity doctrine in the second decision that framed the dispute in *NLC*, the 1946 decision in *New York v. United States*.[43] At issue in *New York* was a two-cents-per-gallon federal tax on the production of soft drinks.[44] The State of New York, which had taken control of Saratoga Springs to address private overuse of the springs and was selling mineral water in order to fund the resort and spa, joined forty-five other states to argue that states should be immune from the tax.[45] Although a badly fractured Court could not agree on the governing doctrinal rule, every Justice agreed that the sovereignty of the states required the Court to limit Congress's taxing power.[46]

Justice Frankfurter's opinion for the Court rejected the traditional nineteenth century rule in part because "social complexities" made the rule unworkable[47] and in part because, anticipating Herbert Wechsler's political safeguards argument, "the States share in the legislative process by which a tax of general applicability is laid."[48] He instead supported a non-discrimination rule, which required only that the tax treat the states like it treated private parties.[49] This rule, Frankfurter argued, retained sufficient protection for state sovereignty because "[t]here are . . . State activities and State-owned property that . . . . inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing."[50]

Justice Stone wrote separately to argue for a rule more protective of the states.[51] "[A] federal tax which is not discriminatory as to the subject matter," he argued, "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's

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42. *Id.* at 185.
43. 326 U.S. 572, 582–83 (1946).
44. *Id.* at 573–74.
45. *Id.* at 575.
46. *Id.* at 574–75 (plurality opinion); *id.* at 586 (Stone, J., concurring); *id.* at 591 (Douglas, J., dissenting). The rule was applied in *South Carolina v. United States*, 199 U.S. 437, 463 (1905), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *Ohio v. Helvering*, 292 U.S. 360, 371 (1934), *overruled by Garcia*, 469 U.S. 528, and *Helvering v. Powers*, 293 U.S. 214, 227 (1934), *overruled by Garcia*, 469 U.S. 528. In a badly fractured decision, the entire Court rejected the existing doctrinal rule, which allowed federal taxation of "proprietary" State activity—activity in which a private business might participate—but not federal taxation of "traditional" state government activities. *New York*, 326 U.S. at 574, 583.
47. *New York*, 326 U.S. at 576.
48. *Id.* at 577.
49. *Id.* at 582–84.
50. *Id.* at 582.
51. *Id.* at 587 (Stone, J., concurring).

performance of its sovereign functions of government."[52] A better approach, Stone suggested, was case-by-case balancing aimed at protecting both federal and state governments' taxing powers while allowing each government to function with a minimum of interference.[53] "The problem," he wrote, "is not one to be solved by a formula."[54]

Justice Douglas's dissent went even farther by suggesting that the Tenth Amendment prohibited the federal government from taxing any state activity at all. Frankfurter's non-discrimination rule, he wrote, "disregards the Tenth Amendment, places the sovereign States on the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution."[55] Every Justice in *New York* thus recognized a role for the judiciary in protecting the autonomy and sovereignty of the States from the federal taxing power.

The decision, as a result, gave plaintiffs in *NLC* something to work with. The different treatment of Congress's taxing and commerce power was clear, but a principled explanation for it was not.[56] Nothing in the constitutional text that granted Congress its commerce or taxing power suggested they should be treated differently by the Court, and both were enumerated in Article I, Section Eight of the Constitution.[57] The truth of *McCulloch v. Maryland*'s[58] famous aphorism that the power to tax is the power to destroy was dubious in the twentieth century[59] and, even if the power to tax remained the power to destroy, the expansion of the commerce power from the 1940s to the 1960s made the commerce power look just as threatening to state sovereignty.[60]

This tension between the Court's tax and commerce powers jurisprudence provided the doctrinal justification for Justice Rehnquist's ruling in *NLC* that the 1974 Amendments to the FLSA violated the Constitution. Rehnquist did not deny that the 1974 Amendments were regulations of interstate commerce. It was established, he wrote, "beyond peradventure," that Congress could regulate wages and hours using its

52. *Id.*
53. *Id.* at 589–90.
54. *Id.* at 589.
55. *Id.* at 596 (Douglas, J., dissenting).
56. In *Case v. Bowles*, 327 U.S. 92, 101–02 (1946), the Court held that the War Power ought to be treated like the commerce power. *Maryland v. Wirtz*, 392 U.S. 183, 198 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), and *Fry v. United States*, 421 U.S. 542, 543–44 (1975), supported the distinction between the tax and commerce power, but none of those decisions provided clear reasons. They are discussed below. *See infra* notes 124–31, 295–331, and accompanying text.
57. U.S. CONST. art. I, § 8, cl. 1, 3.
58. 17 U.S. 316, 327 (1819).
59. *See, e.g.*, Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits."), *overruled in part by* Alabama v. King & Boozer, 314 U.S. 1 (1941).
60. Katzenbach v. McClung, 379 U.S. 294, 301–02 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964); Wickard v. Filburn, 317 U.S. 111, 124 (1942).

commerce power.[61] But he nevertheless ruled that principles of federalism implicit in the structure of the Constitution prevented the federal government from interfering with the integrity and function of state government.[62]

Not surprisingly, the primary authority he offered for this decision was *New York v. United States*. Justice Stone's opinion in *New York*, Rehnquist argued, indicated that Congress could not use its taxing power to interfere with the integrity and function of state governments.[63] Rehnquist then argued there was no justification for treating the taxing and commerce powers differently.[64] Finally, he held that the 1974 Amendments interfered with the autonomy of the states because setting the terms of employment was an attribute of state sovereignty that was "essential to [the] separate and independent existence" of the states.[65] Both the minimum wage and overtime requirements limited important policy decisions of the states and thus needed to be struck down.[66]

B. National League of Cities *and the Political Safeguards Thesis*

As the foregoing discussion indicates, there was some doctrinal support for the Court's decision in *NLC*, but case law certainly did not require the result. In fact, as both the tone and substance of Justice Brennan's opinion indicated, *NLC* was a clear departure from the Court's Commerce Clause doctrine. Despite the support it found in the tension between the Court's treatment of Congress's taxing and commerce powers, Rehnquist's opinion had to overrule *California* and *Maryland v. Wirtz*—a 1968 decision that had explicitly continued *California*'s approach to the commerce power—and distinguish *Fry v. United States*[67]—a decision from the previous term that also seemed to support *California*.[68]

Justice Brennan's dissent pointed out these problems and added a pragmatic critique as well.[69] However, he reserved special vitriol for the majority's rejection of a theoretical justification for deference to Congress that had driven Commerce Clause doctrine for decades: the politi-

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61. *Nat'l League of Cities*, 426 U.S. at 840.
62. *Id.* at 842–43.
63. *Id.* at 843–44.
64. *Id.* at 843.
65. *Id.* at 845 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)) (internal quotation mark omitted).
66. *Id.* at 851–52.
67. 421 U.S. 542 (1975).
68. *Id.* at 879 (Brennan, J., dissenting). *Fry* is discussed in detail in Part IV. *See infra* notes 295–331 and accompanying text.
69. That doctrinal tests based on a judicial determination of what activities were "essential" to state government were unworkable, Brennan argued, had been recognized at least since Justice Stone's opinion in *New York* in 1946. *Id.* at 864. Asking courts to determine whether an activity was "integral" to the function of state government, as the majority proposed, was no better. *Id.* at 871.

cal safeguards thesis. The majority decision, he wrote, was a "patent usurpation of the role reserved for the political process."[70]

Since at least 1942, when it helped convince Justice Robert Jackson to adopt the "aggregation principle" in *Wickard v. Filburn*,[71] the idea that the Court should defer to Congress on federalism issues because Congress had political incentives to provide the appropriate respect for the states had been central to the Court's treatment of the commerce power.[72] But the argument was systematized and given its name by Herbert Wechsler in one of the most cited law review articles of all time: his 1954 *Political Safeguards of Federalism*.[73]

There, Wechsler famously argued that judicial protection of the autonomy of states was unnecessary, unwise, and inconsistent with the founders' design and a proper understanding of the judicial role.[74] The Constitution, he argued, did not depend on the Supreme Court's enforcement of the enumeration of powers and the Tenth Amendment to protect federalism.[75] It wisely provided other protections to state autonomy. The states, he pointed out, kept their own independent basis of authority and their own administrative machinery.[76] But even more importantly, they helped select the leadership of the national government.[77] Those "political safeguards of federalism" sufficed to ensure the proper protection of state autonomy.

In advancing that argument, Wechsler emphasized that, even after the Seventeenth Amendment, states had enormous influence over senators and thus over national policy. In 1950, he pointed out, filibuster rules would permit seventeen states with a total combined population less than the state of New York to stifle any bill.[78] And, of course, the power to stop legislation was a powerful tool in negotiations that the states could use to ensure fair, or even more than fair, treatment by the national government.

The House also gave the states significant influence over the national government. The Constitution allows states to control the shape of congressional districts—which, in 1954, did not need to be of equal population—as well as determine who could vote for Congress by tying qualifications for congressional elections to the criteria for the lowest

70. *Id.* at 858.
71. 317 U.S. 111 (1942).
72. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 221–24 (1998).
73. Wechsler, *supra* note 15, at 545–47.
74. *See* Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301, 304–07 (1988).
75. Wechsler, *supra* note 15, at 545–46.
76. *Id.* at 543–44.
77. *Id.* at 552–53.
78. *Id.* at 547.

house of the state legislature.[79] Thus, state legislatures, controlled by state parties, could use literacy tests, poll taxes, gerrymandering, or other methods to ensure that their interests and autonomy were respected.[80]

Even the President, the most national of federal positions, was responsive to the power of the states. The Constitution itself specified that state legislatures would determine the manner of selecting presidential electors. More practically, the Electoral College focused presidential candidates on a limited number of close states, which provided the people and the political parties of those states influence over the President. Thus, at least some states and some state parties would have the authority to influence the President on questions of state autonomy.

Wechsler's arguments for political safeguards as the appropriate way to draw the line between state and federal power convinced so many because it fit neatly with every major justification for judicial review.[81] For pragmatists, Wechsler's argument freed the national government from foolish legalisms. When it was necessary to prevent problems like destructive, "race to the bottom" interstate competition, the national government with the input of the States could institute a single national rule. When local control was better, national involvement could be avoided. It was this insight that convinced pragmatist Robert Jackson to support the "aggregation principle" of *Wickard v. Filburn* despite his concern that it would remove Court oversight of the reach of Congress's commerce power.[82]

For patrons of judicial restraint, the political safeguards approach was welcome because it minimized the invalidation of democratically passed laws. Felix Frankfurter—a leading supporter of deference—adopted a version of what became Wechsler's argument in *New York v. United States*, where he justified his new rule for intergovernmental tax immunity by noting that "the States share in the legislative process by which a tax of general applicability is laid."[83]

For political process theorists who drew on Chief Justice Stone's famous footnote four in *Carolene Products*,[84] aggressive judicial protec-

79. *Id.* at 548–49.

80. *Id.* at 549–52.

81. Charles W. McCurdy, Remarks at the Robert Cross Memorial Lecture (2011) (transcript on file with author).

82. CUSHMAN, *supra* note 72, at 224 (recounting Justice Jackson's struggle with *Wickard* and his ultimate adoption on political safeguards grounds); *see also* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 123–25 (2010) (identifying Robert Jackson as a pragmatist). Justice Stone recognized similar pragmatic reasons in *Helvering v. Gerhardt*, 304 U.S. 405 (1938), an intergovernmental tax immunity decision. The political process, he argued, "provides a readier and more adaptable means than any . . . courts can afford, for securing accommodation of the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other." *Id.* at 416.

83. 326 U.S. 572, 577 (1946).

84. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

tion of rights was necessary only when the political process or the rights of discrete and insular minorities were being threatened. States, Wechsler argued, in effect, were not a discrete and insular minority and had ample opportunities to exercise political power. Stone advanced what later became Wechsler's argument in *Helvering v. Gerhardt*[85] in 1938. He rejected claims that states should have the same immunity to federal taxation that the federal government had to state taxation on the grounds that "the people of all the states have created the national government and are represented in Congress."[86] "Through that representation," he continued, "they exercise the national taxing power. The very fact that when they are exercising it they are taxing themselves serves to guard against its abuse through the possibility of resort to the usual processes of political action."[87]

For those concerned with the intentions of the founders, Wechsler pointed out his idea wasn't really his, it was James Madison's. He quoted a letter Madison wrote that listed three ways the states would be protected from the national government: (1) the role of the state and the people of the states in the election of the Senate and the House; (2) the role of the states and the people of the states in the election of the President; and (3) the ability of the House and Senate to impeach and remove executive officers.[88] Madison, Wechsler noted, did not mention the Court at all.[89]

Wechsler's argument provided clear support for Congress's aggressive uses of the commerce power in the 1964 Civil Rights Act, which the Court upheld in *Heart of Atlanta Motel*[90] and *Katzenbach v. McClung*.[91] And its abandonment incensed Brennan in *NLC*.[92] In addition to calling the decision a usurpation of authority that should reside with the political process, Brennan specifically cited Wechsler. "Judicial restraint in this area," he wrote,

> merely recognizes that the political branches of our Government are structured to protect the interests of the States . . . and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House *Elected from the States*. . . . Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal interven-

85. 304 U.S. 405 (1938).
86. *Id.* at 416.
87. *Id.*
88. Wechsler, *supra* note 15, at 558–59.
89. Wechsler's argument was broadly accepted by legal academics, too. *See, e.g.*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 73 (1969); Paul A. Freund, *Umpiring the Federal System*, *in* FEDERALISM: MATURE AND EMERGENT 159, 163 (Arthur W. MacMahon ed., 1955).
90. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964).
91. 379 U.S. 294, 298 (1964).
92. Nat'l League of Cities v. Usery, 426 U.S. 833, 876 (1976), *overruled by* Garcia v. San Antonia Metro. Transit Auth., 469 U.S. 528 (1985).

> tion into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress.[93]

Brennan continued by arguing that contemporary practice supported Wechsler's predictions.[94] The "enormous . . . political power" of the states, he wrote, was not accurately reflected in the potential $1 billion cost of the FLSA amendments.[95] More important was the $60.5 billion the states received from the federal government.[96] States, he wrote, were complaining of the costs of the FLSA amendments on police and fire departments, but the federal government was providing $716 million of assistance to such entities.[97] The states were complaining about the problems the amendments created for summer jobs for students, but the federal government was already providing $400 million for such jobs—enough for 670,000 students to work for state or local government.[98]

It seems clear, given these arguments, that while the majority's position was not without support in traditional legal materials, that support was far from decisive. In fact, given the broad support for the political safeguards thesis and the decisions in *California* and *Wirtz*, it seems more reasonable to view *NLC* as a substantial change in approach made in spite of existing legal materials. But regardless of whether *NLC* is understood as a correct or incorrect interpretation of existing legal materials, the important point for the purposes of this Article is that an analysis of traditional legal materials cannot explain the decision because those materials cannot explain why the tension between the Court's commerce and taxing power doctrines that had existed for forty years became unbearable only in 1976. No change to the constitutional text can explain it. Nor can changes to related doctrinal structures. Rather, some other factor must explain why Rehnquist and four other Justices in the *NLC* majority decided to ignore the implications of the political safeguards thesis and resolve the doctrinal tension in favor of state sovereignty in 1976.

II. *NATIONAL LEAGUE OF CITIES* IN POLITICAL CONTEXT

Some scholars who share my doubts that traditional legal materials can explain the return of constitutional federalism have looked for alternative explanations. Almost all found a single cause: conservative politics.[99] They certainly do not agree on every issue.[100] Some have argued

93. *Id.* at 876–77 (emphasis added) (citing Wechsler, *supra* note 15).
94. *Id.*
95. *Id.* at 878.
96. *Id.*
97. *Id.*
98. *Id.*
99. *See, e.g.*, John Dinan, *The Rehnquist Court's Federalism Decision*, 41 PUBLIUS 158, 158–67 (2011).
100. *See generally id.*

that constitutional federalism returned because it has been a useful way for conservative Justices to camouflage their efforts to advance a conservative policy agenda.[101] Others have argued that view is at least incomplete because they believe the Court's federalism decisions have generally, but not always, advanced conservative political goals.[102] But they too see politics as the crucial cause, arguing that constitutional federalism returned because the rise of the New Right allowed Republican presidents to appoint Justices who shared their party's long established ideological opposition to federal power.[103] Keith Whittington's identification of larger social, political, and intellectual structures that influenced federalism doctrine points towards a different kind of explanation, but even he indicates those structural changes mattered because they provided opportunities conservative Justices needed to advance their own political preferences.[104] This part continues examining *NLC* in its historical context to argue conservative politics cannot effectively explain the return of the debate over constitutional federalism that became clear in *NLC*.

None of this is to suggest that a political explanation for *NLC* cannot find significant support from the historical record. There is, in fact, substantial evidence. The case was decided after Richard Nixon made four Supreme Court appointments, every vote in the majority came from a Republican appointee, and the majority opinion was written by President Nixon's third appointment, then-Justice Rehnquist, who undoubtedly had conservative political preferences.[105] Furthermore, the majority's concern with protecting state autonomy had some similarities to Nixon's "New Federalism" policy. Nixon even vetoed the 1974 Amendments in part on federalism grounds. More broadly, because the opinion limits congressional authority, it can be seen to reflect the New Right's opposition to federal authority specifically and government authority in general.

Nevertheless, other evidence indicates that viewing conservative politics as the cause of the return of constitutional federalism is incomplete, if not misleading. Two Republican appointees dissented in *NLC*—Justices Brennan and Stevens—and Justice Brennan wrote the impassioned dissent. Other factors are also hard to explain using a purely political model of doctrinal development. First, although Nixon initially vetoed the 1974 Amendments, he later signed them, and his brief mention

101. *See, e.g.*, Schwartz, *supra* note 13, at 155, 166–67; Fallon, *supra* note 13, at 449–94.

102. PURCELL, *supra* note 14, at 158–59; Pickerill & Clayton, *supra* note 14, at 236–43; Purcell, *supra* note 14, at 127–74.

103. PURCELL, *supra* note 14, at 158–59; Pickerill & Clayton, *supra* note 14, at 236–43; Purcell, *supra* note 14, at 127–74.

104. Whittington, *supra* note 25; Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998); Dinan, *supra* note 99, at 162; *see also* Scheiber, *supra* note 2, at 624 n.20. I further explore Whittington's arguments in Part V. *See infra* notes 391–94 and accompanying text.

105. SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 4–5 (1989).

of federalism in his veto message suggests it was an afterthought.[106] It is clear in any case that Nixon did not share the New Right's antipathy to government power in general and federal power in particular.[107] It is hard to understand how the New Right's political preferences could influence the Court when the movement had not yet seized political power. Second, and perhaps most damning to explanations focused solely on conservative politics, the return of constitutional federalism began before either Nixon or Reagan appointed any Justices and originated with Justices who cannot be described as conservatives. The remainder of this part considers those two points in more detail.

A. President Nixon, the New Right, and Federalism

Although federalism rhetoric and policy played an important role in Nixon's administration, his federalism policies were not, like those of the New Right and President Reagan, aimed at undermining federal and governmental power. Nixon's New Federalism agenda aimed to rationalize intergovernmental relations to make regulation more effective. Thus, in areas where state and local governments had special competence—community development, education, and job training—the Nixon administration sought to decentralize real control of federal programs.[108] His General Revenue Sharing Program, the centerpiece of his New Federalism agenda, for example, aimed to replace many narrow federal "categorical" grants to states and localities with fewer large, virtually unrestricted grants.[109]

But Nixon was also clearly willing to exercise federal power when he believed it was the most effective tool. He campaigned to create a federal minimum-income program to replace the existing welfare program.[110] He aggressively expanded federal environmental regulation by helping to pass the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act, all of which placed significant new regulatory requirements on the private sector and the states.[111] He instituted the first national speed limit in response to the OPEC oil embargo by threatening to cut off all federal highway aid to any state that failed to comply with the national standard,[112] and his 1970 Economic Stabilization Act allowed the President to stabilize wages and salaries by, among other

106. Richard Nixon, *The President's Message to the House of Representatives Returning H.R. 7935 Without His Approval (Sept. 6, 1973)*, 9 Wkly. Compilation Presidential Documents 1060 (1973).

107. Whittington, *supra* note 25, at 504 ("Nixon always had an uneasy relationship with the '[N]ew [R]ight' and its ideological concerns.").

108. TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 20–21 (1998).

109. *Id.*

110. *Id.* at 30–31.

111. *Id.* at 89–90.

112. *Id.* at 91.

things, denying pay raises to both public and private sector employees.[113] Nixon clearly did not share the New Right's opposition to federal power. *NLC* thus seems unlikely to be a reflection of the policy preferences of the New Right because the New Right was not yet in power. And Nixon's pragmatism is the antithesis of *NLC*'s focus on "traditional governmental functions."[114]

B. Hugo Black, William Douglas, and the Return of Constitutional Federalism

Also damaging to the political approach is that the return of constitutional federalism began before Nixon made his Supreme Court appointments and emerged, in part, from Democratic appointees. *NLC* was the first time the Court struck down a regulation of interstate commerce on federalism grounds since 1936, but it was not alone in supporting judicial protection of state sovereignty in the late 1960s and early 1970s. *Oregon v. Mitchell* in 1970, *Younger v. Harris* in 1971, and *Maryland v. Wirtz* in 1968 all evinced that concern in varying degrees. These cases were decided before Nixon made all his appointments and included opinions written by Justices Douglas and Black—stalwarts of the Warren Court and appointees of Franklin Roosevelt who are difficult, if not impossible, to consider conservatives or representatives of the New Right.[115]

In *Oregon v. Mitchell* the State of Oregon challenged two amendments to the Voting Rights Act: one that enfranchised eighteen-year-olds in federal elections, the other that enfranchised eighteen-year-olds in state elections.[116] Given the Warren Court's willingness to reshape state political structures entirely on its own in *Reynolds v. Sims*[117] just six years earlier, one might expect *Oregon v. Mitchell* to have been an easy case. Certainly four Justices believed that the case was straightforward, but the case produced a fractured decision. Douglas, Marshall, Brennan, and White voted to uphold both provisions. Justice Harlan's historical investigations led him to join Justice Stewart, Burger, and Blackmun in voting to strike both down. Black's vote was thus decisive, and he returned a split decision: voting to uphold the federal provision, but to strike down the provision regulating state elections.[118]

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113. Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (1970) (codified at 12 U.S.C. § 1904(a) (1970)).

114. Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

115. There are other examples as well. *See, e.g.*, Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1873–78 (1976).

116. 400 U.S. 112, 117 (1970).

117. 377 U.S. 533 (1964).

118. *Mitchell*, 400 U.S. at 118.

Black argued that the Tenth Amendment and the values of federalism protected state elections from federal regulation. "[T]he Constitution," he wrote,

> was . . . intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.[119]

The Civil War Amendments on which Congress relied, Black argued, provided broad but not unlimited authority. The Fourteenth Amendment was not "intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation."[120]

Black showed a similar concern with federalism in *Younger v. Harris* in 1971. His opinion for the Court established a new abstention doctrine on the basis of a history of deference to state court criminal proceedings, the need to protect the role of the jury, and a concern with duplicative legal proceedings.[121] But the decision was also supported by an even more vital consideration:

> [T]he notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federal-

119. *Id.* at 124–25 (footnote omitted).
120. *Id.* at 128.
121. Younger v. Harris, 401 U.S. 37, 43–45 (1971).

> ism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.[122]

Neither *Younger v. Harris* nor *Oregon v. Mitchell* concerned a conflict between Congress's commerce power and state sovereignty. The Court did address that issue in *Maryland v. Wirtz* and Justice Douglas's dissent anticipated the arguments Rehnquist would make in *NLC*.[123]

Wirtz addressed the 1966 Amendments to the Fair Labor Standards Act that extended the Act's coverage to employees of hospitals and other entities run by the States.[124] As the plaintiffs did in *NLC*, Maryland and twenty-seven other states argued that the law was unconstitutional as applied to the states because it interfered with sovereign state functions.[125] Justice Harlan's majority opinion rejected the argument, as Justice Brennan would in *NLC*, because he believed it was based on the discredited ideas of dual federalism and had previously been rejected in *United States v. California*.[126]

Douglas played Rehnquist to Harlan's Brennan. His dissent, joined by Justice Stewart, countered that the different treatment Congress's commerce and taxing powers received under *California* and *New York v. United States* was unjustified. The federal government, he argued, could destroy the autonomy of the states with the commerce power as well as the taxing power.[127] Like the taxing power, "[t]he exercise of the commerce power may also destroy state sovereignty,"[128] especially after *Wickard* and *Katzenbach* clarified its breadth. Cases like *California* should be differentiated from *New York* and the tax immunity cases not because *California* was a commerce clause case and *New York* a taxing power case, but because the interference with State autonomy was meaningful in *New York* (and *Wirtz)* and limited in *California*: "It is one thing to force a State to purchase safety equipment for its railroad [as the law at issue in *California* did] and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas."[129] Ultimately, Douglas recommended a balancing rule: "Whether, in a given case, a particular commerce power regulation by Congress of state activity is permissible depends on the facts."[130]

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122. *Id.* at 44–45.
123. Maryland v. Wirtz, 392 U.S. 183, 195 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).
124. *Id.* at 186–87.
125. *Id.* at 187.
126. *Id.* at 197 (referencing United States v. California, 297 U.S. 175 (1936), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)).
127. *Id.* at 204–05 (Douglas, J., dissenting).
128. *Id.* at 204.
129. *Id.* at 203.
130. *Id.* at 205.

In *Wirtz*, he found those facts constituted a sufficient threat to state sovereignty to justify striking down the 1966 FLSA amendments.[131]

Justice Douglas cannot be accurately characterized as either a conservative or a supporter of the New Right. He was a principle architect of both the New Deal[132] and the Warren Court's rights revolution.[133] He was so unpopular among Republicans that some had called for his impeachment.[134] Given Justice Douglas's support, it is clear conservative politics cannot be a complete explanation for the return of constitutional federalism.

III. THE POLITICAL SAFEGUARDS THESIS AND THE CHANGING DEBATE OVER CONSTITUTIONAL FEDERALISM

If the conventional explanations are unconvincing, how can the return of constitutional federalism in *NLC* be explained? This part argues that the decision resulted from a series of developments that undermined broadly shared faith in the primary justification for judicial deference on federalism questions: Wechsler's *Political Safeguards of Federalism*.[135] Wechsler was far from alone in arguing the political process itself was the best way to properly divide authority between federal and state governments. Almost every close observer of American government believed that real governing authority was shared between different levels of government and that that authority was distributed through a fair, democratic process. The leading voices were further convinced that the sharing of authority helped the system respond effectively to the challenges of the time. These views were so widely accepted because they were supported by a particular set of historical circumstances, the most important of which was the federal government's campaign against de jure segregation sparked by *Brown v. Board of Education*.[136] Those circumstances simultaneously emphasized both the political power of the states and the benefits of expanding federal authority. They made Wechsler's arguments against judicial review of federalism issues appear clearly correct.

By the late 1960s and early 1970s, however, those circumstances had changed and the debate over the appropriate role for judicial review of federalism issues changed with them. Among those changes were the growing administrative dysfunction produced by some of Lyndon Johnson's Great Society programs, the increasing competence of state governments, the shift of the fight for civil rights from de jure segregation into more broadly, though less intensely, contested issues of de facto

131. *Id.* at 204–05.
132. EDWIN P. HOYT, WILLIAM O. DOUGLAS: A BIOGRAPHY 69–72 (1979).
133. *Id.* at 121–24.
134. *Id.* at 146.
135. Wechsler, *supra* note 15.
136. 347 U.S. 483 (1954).

segregation, the growing power of national interest groups, and the belated turn of Southern state governments against racist violence. Observers began to doubt that the sharing of functions between state and federal governments was evidence of the sharing of real governing authority. They began to question whether the political process was fairly and effectively distributing governing functions. Those doubts, in turn, undermined faith in the political safeguards thesis and ultimately led to the return of constitutional federalism in *NLC*.

A. The Political Safeguards Thesis at Its Zenith

The political safeguards thesis at its zenith was more than an article. By the early 1960s it was a set of arguments elaborated by a variety of close observers of the federal system that had grown substantially beyond Wechsler's pithy critique of judicial review of federalism questions. The research those observers produced led to some disagreement, but its primary effect was to produce new arguments that gave Wechsler's ultimate conclusions nearly universal acceptance. It was hard to find disagreement that American government was a system of shared authority distributed through fair, democratic means. And most leading voices saw it as an effective tool for solving the problems of the time.

Observers of American federalism had long understood that the constitutional revolution generated by FDR's appointments to the Supreme Court transformed the American federal system.[137] But until the mid-1950s, the study of federalism continued to focus on formal constitutional analysis.[138] After the mid-1950s, scholars increasingly turned their attention to the actual operation of the federal system.[139] These scholars, wrote Morton Grodzins, a leader in the movement,[140] were concerned not with

> formal, or constitutional, power relationships . . . but with social reality; not with the sporadic umpiring of the courts but with the day-to-day pattern of who does what under whose influence; not with the theoretical locus of supreme powers but with the actual extent of the

137. *See, e.g.*, GEORGE C. S. BENSON, THE NEW CENTRALIZATION: A STUDY OF INTERGOVERNMENTAL RELATIONSHIPS IN THE UNITED STATES ix–x (1941); JANE PERRY CLARK, THE RISE OF A NEW FEDERALISM ix–x (1938); EDWIN S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY xxi–xxv (1934).

138. Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 688–89 (1980).

139. Martin Diamond, *On the Relationship of Federalism and Decentralization*, *in* COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 72, 73 (Daniel J. Elazar et al. eds., 1969) ("[There is a] general contemporary unwillingness to accept what are deemed to be formal, legalistic, mechanistic notions of the American [federal] system and an insistence upon the importance of what are held to be the underlying political realities . . . .").

140. COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, *supra* note 139, at vii.

> sharing of decision-making in legislation and administration between the central, state, and local governments.[141]

Wechsler's political safeguard thesis was part of that movement.[142] His article examined constitutional text and history, but its real bite came from how smoothly he integrated those considerations with an analysis of the political power that states exercised due to their role in the national government.[143] Other scholars soon strengthened Wechsler's claims by exploring how constitutional guarantees interacted with the structure of American political parties.[144] With that refinement, Wechsler's conclusion that the political process was the most democratic, effective, and thus legitimate way to distribute authority between federal and state governments became a near universally accepted principle.

The leading voices in the study of American government agreed that the American federal system shared important governmental functions. As Grodzins famously put it, American intergovernmental relations did not resemble a "three-layer cake" in which power was divided between state, local, and federal governments, but a "marble cake."[145] "Functions are not neatly parceled out among the many governments," he wrote.[146] "They are shared functions. It is difficult to find any governmental activity which does not involve all three of the so-called 'levels' of the federal system."[147] Even government functions traditionally associated with local control—functions like education and law enforcement—were, these observers explained, really shared functions.[148] Federal aid in the 1950s, for example, provided school lunches, trained teachers, built school buildings, and supported testing programs.[149] Local law enforcement provided local knowledge and manpower to support federal investigations, while the federal government provided training, expertise, and access to information like the FBI's fingerprint database.[150]

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141. MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 254 (Daniel J. Elazar ed., 1966).

142. Scheiber, *supra* note 138, at 663.

143. Wechsler, *supra* note 15.

144. Larry Kramer resurrected this argument in his widely noted article. Kramer, *supra* note 12.

145. Morton Grodzins, *The Federal System*, *in* GOALS FOR AMERICANS 265, 265 (The Am. Assembly ed., 1960).

146. *Id.* at 266.

147. *Id.*; *see also* Daniel J. Elazar, *Federalism and Intergovernmental Relations*, *in* POLITICAL SCIENCE IN THE SOCIAL STUDIES 165, 165–66 (Donald H. Riddle & Robert S. Cleary eds., 1966).

148. GRODZINS, *supra* note 141, at 4–5, 89.

149. *Id.* at 5.

150. *Id.* at 105.

Observers identified federal grants-in-aid as both the best example of and most important pathway for this kind of sharing of functions.[151] Though they were created earlier, grants-in-aid had grown consistently since the New Deal.[152] In total dollars, they expanded from around $1.6 billion in 1948 to almost $7 billion by 1960.[153] Most were "categorical grants" that provided federal dollars for specific state activities. These grants had a profound effect on the relationship of the federal government and the states,[154] but even though the money came from Washington, these observers believed grants-in-aid encouraged cooperative problem solving. Grants-in-aid, Grodzins wrote, "have supplied a cooperative method for achieving results that might never have been achieved."[155]

As Grodzins's statement suggests, there was broad agreement that the sharing of government functions demonstrated that real governing authority was shared between state, local, and federal governments.[156] "The sharing of functions is, in fact, the sharing of power," wrote Grodzins.[157] William Riker agreed. States cannot control national decisions, the nation cannot control state decisions, and a standoff was the result.[158] Daniel Elazar—a student of Grodzins—even denied that the American federalist system was "decentralized."[159] That term, he argued, implied there was a central authority that chose to distribute authority to the periphery. But in America, governing functions were distributed through the complex interaction of the center and the periphery, each of which had their own bases of authority.[160] America, he argued, thus ought to be described as a "noncentralized" system.[161]

In explaining the reasons for this shared authority, no one pointed to the doctrinal limits developed by the Supreme Court. Such limits were universally agreed to be moribund.[162] Most observers—though not

151. *Id.* at 60 ("[G]rant-in-aid programs . . . have been the foremost forces to bring about planned national-state collaboration."). *See generally* DEIL S. WRIGHT, FEDERAL GRANTS-IN-AID: PERSPECTIVES AND ALTERNATIVES (1968); Grodzins, *supra* note 145, at 266.

152. *See generally* V.O. KEY, JR., THE ADMINISTRATION OF FEDERAL GRANTS TO THE STATES (1937).

153. GRODZINS, *supra* note 141, at 61.

154. *Id.* at 60.

155. *Id.* at 62.

156. Even in the 1950s, there were some who saw the states as lacking authority. C. Wright Mill's *Power Elite* (1956) saw power concentrated in the hands of an American elite, a theme supported by G. William Dornhoff in *Who Rules America?*, (1967), and *The Higher Circle: The Governing Class in America*, (1970). Arthur S. Miller saw economic power delegated to private industry like corporations, which in reality were more powerful than states, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 637 (1958), which he saw as administrative units, *id.* at 629. Leonard D. White saw evidence of declining state authority in *The States and the Nation*, (1953). But by the early 1960s, these views were not shared by students of the federal system.

157. GRODZINS, *supra* note 141, at 289.

158. WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 103–04 (1964).

159. DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 3 (1966).

160. *Id.* at v–vii, 3.

161. *Id.* at 3.

162. *See, e.g.*, SAMUEL KRISLOV, THE SUPREME COURT IN THE POLITICAL PROCESS 81 (1965) (describing the Court's approach to limiting federal power as a "'leave it to Congress' attitude").

all[163]—accepted Wechsler's arguments that the Constitution protected the authority of the states to influence the federal government.[164] They agreed that state legislatures shaped the preferences of their state's congressional delegation through their power to apportion Congressional districts.[165] And state control over federal elections provided a way for the states to influence their national representatives, thus providing a "*de facto* bulwark against overextension of federal authority."[166]

But these observers emphasized the importance of informal institutional structures. Congress's institutional tradition of distributing committee chairmanships by seniority rather than merit or loyalty to party leadership left current and aspiring chairmen able to focus on local rather than national issues.[167] State and local lobbying alliances provided another way for states to influence national policy,[168] and state administrative officers could influence federal authority through their contacts with Washington officials.[169] And all agreed that the primary reason governing authority was shared between state and federal governments was the American system of political parties.[170]

American political parties, these observers noted, were not unified, programmatic parties like their European counterparts. They were largely undisciplined coalitions of state parties with limited ability to influence their membership.[171] "[T]he real centers of party organization, finance, and power," Daniel Elazar wrote, "are at the state and local levels."[172] This "lack of party solidarity," argued Grodzins, "fundamentally establishes the marble cake of shared functions that characterizes the American federal system."[173] William Riker and David Truman agreed.[174] And they saw no reason to expect that to change.[175]

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163. RIKER, *supra* note 158, at 89–91.

164. GRODZINS, *supra* note 141, at 277–78.

165. *Id.* at 220–24.

166. ELAZAR, *supra* note 159, at 142–43.

167. GRODZINS, *supra* note 141, at 283.

168. Totton J. Anderson, *Pressure Groups and Intergovernmental Relations*, 359 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 122–23 (1965).

169. ELAZAR, *supra* note 159, at 150–51 ("[S]tate agencies can be of help to their state's representatives in Washington . . . . In return, the congressmen will often help a state agency by securing additional funds . . . .").

170. GRODZINS, *supra* note 141, at 254 ("[T]he nature of American political parties accounts in largest part for the nature of the American governmental system."); RIKER, *supra* note 158, at 87, 101 ("[T]his decentralized party system is the main protector of the integrity of states in our federalism.").

171. RIKER, *supra* note 158, at 93 (noting that one of the most well knows facts about American government is that the President cannot "count on substantially complete support from his partisans in Congress").

172. ELAZAR, *supra* note 159, at 49–50.

173. GRODZINS, *supra* note 141, at 260. "[P]arties are responsible for both the existence and form of the considerable measure of decentralization that exists in the United States." *Id.* at 254.

174. RIKER, *supra* note 158, at 104; *see* David. B. Truman, *Federalism and the Party System*, *in* AMERICAN FEDERALISM IN PERSPECTIVE 81, 82, 91–96 (Aaron Wildavsky ed., 1967).

175. GRODZINS, *supra* note 141, at 285.

States, they also believed, could then use Congress's oversight function to influence the federal bureaucracy.[176] Congressmen worked consistently to help local interests influence administrative action. Congressional staff did this work "with great care, knowing that their congressman's performance in that area is often likely to influence more voters than his actions on remote national issues."[177] Grodzins believed this oversight was "constant, effective, and institutionalized," and "almost uniformly exercised in behalf of local interests."[178]

The vision of shared functions and governing authority advanced by these observers did not, however, blind them to the increasing role the federal government was playing in governing American society.[179] They noted the steady increases in federal grants-in-aid, as well as Warren Court's decisions. The Court limited state autonomy with its criminal justice, incorporation, and desegregation decisions, as well as its expansion of First Amendment protection in the areas of libel, obscenity, and church–state issues.[180] Its decisions upholding civil rights legislation, expanding federal administrative preemption, and extending the reach of the Commerce Clause simultaneously increased federal authority.[181] The Court was, William Riker wrote, "a major force for centralization."[182]

Increased federal authority did not suggest to these scholars that the political safeguards thesis was wrong. Some minimized these changes,[183] but most were unconcerned because they believed increases in federal authority were democratic and functional responses to the challenges of the time. They took this perspective whether they found American federalism itself a useful or harmful institution as a whole.[184] Growing federal power, Grodzins claimed, was a result of technological developments that were knitting the nation closer and closer together and "the demands

176. ELAZAR, *supra* note 159, at 144–45; Kenneth E. Gray, *Congressional Interference in Administration*, *in* COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, *supra* note 138, at 521, 521–23.

177. ELAZAR, *supra* note 159, at 145.

178. GRODZINS, *supra* note 141, at 260.

179. RIKER, *supra* note 158, at 81.

180. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 279 (1996).

181. *Id.* at 260, 279.

182. RIKER, *supra* note 158, at 102.

183. ELAZAR, *supra* note 159, at 54 (making similar claims); RIKER, *supra* note 158, at 81 (arguing that federal power had grown, but state power had as well, if not as much). *See generally* DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES (1962); GRODZINS, *supra* note 141, at 17–57 (making historical claims that these changes were not important because American federalism had always been characterized by functional, negotiated sharing of power); Elazar, *supra* note 147; Grodzins, *supra* note 145.

184. William Riker made clear his opposition to American Federalism: "The main beneficiary throughout American history has been the Southern whites, who have been given the freedom to oppress Negros . . . . The judgment to be passed on federalism in the United States is therefore a judgment on the values of segregation and racial oppression." RIKER, *supra* note 158, at 152–53. Grodzins, Elazar, and others were much more supportive. *See, e.g.*, COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, *supra* note 139, at 6, 65.

of the citizenry."[185] William Riker attributed it to a decline in "state nationalism" caused by increased mobility, a growing common culture, and patriotism generated by war.[186] Elazar and others argued it was an inevitable response to increasing calls for government activity in a situation where the federal government's taxing authorities were more robust and responsive.[187]

Many also believed federalism made American government more democratic.[188] The system, with its divided and overlapping authorities, admitted Grodzins, is one of "chaos" which "flaunts virtually all tenets of legislative responsibility and administrative effectiveness. It appears always to be wasteful of manpower and money. At times it threatens the very democracy it is established to maintain. But," he concluded, "it works, it works—and sometimes with beauty."[189] A large part of this success was federalism's tendency to promote democratic values by making it easier for different groups to influence the government.[190]

B. The Zenith of the Political Safeguards Thesis in Context

Faith that the American federal system was characterized by shared authority and was responding productively and democratically to the challenges of the time was supported by the politics of the 1950s and early 1960s. The most important support was the progress of the fight against de jure segregation in the South.[191] The failure of the states to

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185. GRODZINS, *supra* note 141, at 319. The "expansion of the central government," Grodzins argued,

> has been produced by the dangers of the twentieth century . . . [and even] [w]ar items aside, the free votes of a free people have sustained federal programs in such areas as public welfare, highways, airports, hospitals and public health, agriculture, schools, and housing and urban redevelopment . . . . The plain fact is that large population groups are better represented in the constituencies of the President and Congress than they are in the constituencies of governors and state legislatures.

Id. at 318.

186. RIKER, *supra* note 158, at 105–08.

187. ELAZAR, *supra* note 159, at 62–63; WALTER W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY 128–29 (1967). Heller was the leader of the Council of Economic Advisors. *Id.* at 15.

188. GRODZINS, *supra* note 141, at 14–15; Grodzins, *supra* note 145, at 265–66.

189. GRODZINS, *supra* note 141, at 7; *see also id.* at 14–16; RIKER, *supra* note 158, at 147; Grodzins, *supra* note 145, at 282.

190. Anderson, *supra* note 168, at 117–20. Evidence that these feelings of confidence in the federal system were shared outside academia is in the U.S. COMM'N ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS, H.R. DOC. NO. 198, at 2–6 (1955). Tasked by President Eisenhower with identifying programs that could be more effectively returned to state governance, the Commission spent years of study to "identify only two programs—vocational education and municipal waste treatment." Purcell, *supra* note 14, at 147.

191. RIKER, *supra* note 158, at 142, 155 (identifying the question of "whether or not the national decision" regarding citizen rights for African-Americans as "the chief question of public morals," and arguing that "if in the United States one disapproves of racism, one should disapprove of federalism"); *Introduction* to Robert S. Rankin, *The Impact of Civil Rights upon Twentieth-Century Federalism*, *in* COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, *supra* note 139, at 580, 580 ("[C]ivil rights has accounted for much of the recent general tension in our nation. . . . [and] is one of the few issues in the United States that is intrinsically a problem of federalism."); Robert S. Rankin, *The Impact of Civil Rights upon Twentieth-Century Federalism*, *in*

protect peaceful protestors, civil rights workers, and even African-Americans not directly involved in the movement from violence, or to effectively prosecute the offenders, confirmed for many that state governments were undemocratic and either unable or unwilling to perform even the most basic task of protecting their citizens from lawless violence. Simultaneously, the effectiveness with which Southern states resisted even direct orders from the federal government demonstrated that they retained significant authority in the federal system. Those two observations made the ongoing shift in authority from state governments to the federal government seem a functional response to the most pressing challenges of the time. The claims of the political safeguard thesis appeared borne out in every particular.

1. Undemocratic and Incompetent States

It is clear that the failure of Southern state governments to protect African-Americans and supporters of the civil rights movement from violence confirmed doubts that close observers of American federalism already shared about the competence of state governments. General concerns with the competence of state governments were evident in the 1950s in a variety of sources. The Kestnbaum Commission argued that pressures for centralization came in part from weaknesses in state government.[192] V.O. Key agreed, further pointing out that state governments across the nation gerrymandered their electoral districts in ways that undermined democratic principles.[193] State governments were widely recognized to be heavily gerrymandered to favor not just white but also rural interests.[194] Observers also noted the significant weaknesses in state administrative capacity.[195] Most state legislatures met only every other year, and both state legislatures and executives often lacked access to meaningful administrative expertise.[196] Robert Rankin, a political science professor and Chairman of the Civil Rights Commission,[197] wrote, "[S]tates . . . are to a great degree responsible for citizens turning to the federal government for action and relief. . . . [P]eople have demanded services and protection, and the states have refused to give them."[198]

COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM, supra note 139, at 581, 581–84.

192. GRODZINS, *supra* note 141, at 317.

193. *Id.*

194. *Id.* at 213–20 ("[U]nderrepresentation" accounts for a disadvantage in states legislatures, Grodzins argued, though consistent with his sanguine view of American federalism, he also argued that the role of the cities in electing the governor, their lobbying authority, and their ability to build coalitions with some rural interests made the problems less than they might appear.).

195. *See, e.g.*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, 1 FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM 36–44 (1967).

196. *Id.* at 43–44.

197. *Introduction* to Rankin, *supra* note 191, at 580, 580.

198. Rankin, *supra* note 191, at 591.

The abject failure of the Southern state governments to challenge racist violence powerfully reinforced doubts about the competence and fairness of state governments. The Supreme Court's decision in *Brown v. Board of Education* in 1954 sparked an epidemic of violence in the South against African-Americans and proponents of civil rights that went largely unopposed, unpunished, and unprosecuted. In many cases, it was even supported by Southern state governments.[199] Between 1955 and 1959 there were "210 recorded incidents of [racial] intimidation" related to tensions sparked by *Brown v. Board*, ranging from Klan rallies to death threats, and 225 incidents of anti–civil rights violence, including six murders, twenty-nine assaults with firearms, and forty-four beatings.[200] Between 1955 and 1958, "ninety southern homes suffered damage from anti–civil rights violence, [including] sixty from explosives, fifteen from gunfire, [and] eight from arson."[201] Over the same period, mob violence threatened seventeen towns and cities.[202]

Riots and other violent responses to civil rights protests were a common occurrence. Martin Luther King's home was dynamited in 1956 during Montgomery civil rights protests.[203] An attempt to integrate the University of Mississippi in 1962 resulted in bloody rioting.[204] Two years later, the Mississippi Freedom Summer led to what historian Michal Belknap called "a summer of rampant terrorism"[205] that included the deaths of three civil rights workers, the shooting of at least four other persons, fifty-two beatings, and the burning of thirteen black churches.[206] The Southern Christian Leadership Council's campaign against racism in Birmingham, Alabama sparked remarkable violence, including reports of twenty bombings, shootings, and beatings in seven months.[207]

What is more, these acts of violence regularly went unpunished, and often even unprosecuted. An all-white jury famously acquitted the murderers of Emmett Till, and such jury nullification was not uncommon.[208] Between 1955 and 1957 "southern juries freed the white defendants" in thirteen of "fourteen widely publicized" civil rights cases.[209] Often perpetrators were not even indicted and sometimes Southern law enforcement even supported the violence. The riots resulting from attempts to integrate the University of Mississippi were themselves sparked by the Mis-

199. MICHAL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-*BROWN* SOUTH 27 (1987).
200. *Id.* at 28–29.
201. *Id.* at 29.
202. *Id.*
203. *Id.* at 53.
204. *Id.* at 89–91.
205. *Id.* at 135.
206. *Id.* at 138.
207. *Id.* at 99.
208. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 424–25 (2004).
209. BELKNAP, *supra* note 199, at 32.

sissippi governor urging state officials and the public to defy the court-ordered integration.[210] Michael Belknap has claimed that during the violence sparked by the Mississippi Freedom Summer, most of the rural sheriffs believed that their primary job "was to control Negroes, not to protect them from white attackers."[211] Mississippi prosecutors collaborated with their sheriffs by failing to prosecute offenders, and all-white juries acted as a backstop for the few prosecutions that were brought.[212]

Mississippi was a leading site of violence, but its support of racist violence was hardly rare. In Birmingham in 1963, violence against civil rights protestors was not just permitted but even inflicted by Bull Connor's all-white police force.[213] A Miami assistant police chief made clear his officers would not help protect African-American children as they began the court-ordered integration of public schools: "If they ask for trouble, they needn't come to us for guards."[214]

This violence and the failure of Southern state governments to respond effectively convinced many that states were failing at their most basic tasks of protecting the rights of their citizens and enforcing public order. One result was calls for federal legislation designed to force the states to carry out their responsibilities or to transfer those responsibilities to the federal government.[215] Michael Klarman has shown how violence like the police dogs, fire hoses, and nightsticks Bull Connor's officers used on peaceful protestors in Birmingham contributed to the passage of the 1964 Civil Rights Act and other civil rights legislation that extended federal power into traditional state functions.[216] Similarly, the failure of Mississippi to effectively punish—or in many circumstances even prosecute—the violence sparked by the Mississippi Freedom Summer led to passage of the Civil Rights Act of 1968, which gave federal prosecutors the legal authority they needed to prosecute that kind of racist violence.[217]

2. Powerful and Influential States

While perceptions of the states as anti-democratic and incompetent supported the political safeguards thesis by suggesting that the growth of federal power was both functional and democratic, the South's success in using popular protest, state governmental institutions, and their federal

210. *Id.* at 89–91.
211. *Id.* at 138–39.
212. *Id.* at 140.
213. KLARMAN, *supra* note 208, at 434.
214. BELKNAP, *supra* note 199, at 33 (quoting Benjamin Muse, Confidential Memorandum on Law Enforcement in Miami—Conversation with Assistant Chief of Police J. J. Youell, Folder 75-01-58-38, SRCC) (internal quotation marks omitted).
215. BELKNAP, *supra* note 199, at 97–100; *see also* KLARMAN, *supra* note 208, at 436.
216. Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82–83 (1994); *see also* BELKNAP, *supra* note 199, at 99–100; KLARMAN, *supra* note 208, at 435–36.
217. BELKNAP, *supra* note 199, at 99–101, 139–42, 237–38.

representatives to resist even direct federal orders provided proof that American government was not dominated by national institutions.[218] "Despite constant reaffirmations by the federal courts in the past two decades," wrote Daniel Elazar, "and despite presidential willingness to intervene with force where the states allow [the civil rights of African-Americans] to be publicly suppressed by force, the entire question of Negro rights remains greatly dependent on the willingness of the states to aid in carrying out, or in complying with, national policy."[219]

3. Functional Federalism

A third support for the political safeguards thesis was the progress, however slow and halting, of the Civil Rights Movement, which was seen as evidence that the federal system worked.[220] Morton Grodzins summarized this argument. He saw the "Negro problem" as the problem of de jure segregation in the South,[221] and recognized that federalism had helped create it by giving southern states the power to slow national action.[222] But he still saw progress, which led him to keep faith with federalism.[223] He admitted one reason for progress was the "sheer force of public opinion," pushed by the decision in *Brown v. Board* and the Cold War.[224] But federalism, he argued, was another. It made African-Americans in Northern and Midwestern cities a crucial voting bloc that could push presidents and non-Southern elected officials towards reform.[225] "Integration of Negros," he concluded, "everywhere in law and many places in social life, will be achieved, I believe, in a relatively short time, [by] utilizing the possibilities of federalism to overcome the barriers a federal system had previously supported."[226]

C. Changing Contexts

The circumstances that supported the near universal faith in the political safeguards thesis, however, had changed by the early 1970s. Rising faith in state governance as a result of their belated concern with rac-

218. GRODZINS, *supra* note 141, at 297–98.

219. ELAZAR, *supra* note 159, at 5–6.

220. GRODZINS, *supra* note 141; Elazar, *supra* note 147, at 167–70. Grodzins, for example, described school desegregation as an example of a conflict so fundamental that only a "demonstration of strength on one side or another" could solve it, but also saw it as reaching the correct solution because "the view of the whole nation must prevail" on such basic conflicts. Grodzins, *supra* note 145, at 278.

221. GRODZINS, *supra* note 141, at 292–93 (describing the "Negro problem" as a problem of African-Americans being denied "the vote and the equal use of publicly supported facilities, especially schools, but also . . . public transportation, libraries, parks, and swimming pools," rights they had already won in the North).

222. *Id.* at 292–94.

223. *Id.* at 301.

224. *Id.* at 301–03.

225. *Id.* at 294–95, 295 n.† (providing an Editor's Note discussing the "civil rights breakthrough of 1964 which brought a total collapse of the Southerner's veto power over civil rights legislation in Congress" for excellent evidence of this change).

226. *Id.* at 306.

ist violence combined with rising concerns about federal dysfunction to convince many that the rapidly accelerating growth in federal authority was unlikely to be the result of a fair, democratic process. Simultaneously, a decline in the political influence of state political parties and a rise in the power of national interest groups offered a way to explain what many saw as unproductive increases in federal power. Together these developments undermined faith that the political safeguards thesis was an accurate description of American government. That conclusion, in turn, led to new support for judicial intervention.

1. Expanding Federal Authority

Though growth in federal authority was a consistent theme of the twentieth century, observers perceived a clear acceleration in the mid- to late-1960s. Through the 1950s domestic spending remained equally balanced between the states and the federal government, a place it had reached after a slow and steady increase from the federal government's 20% share in 1929.[227] The 1960s, on the other hand, saw explosive growth in federal domestic spending. The number of grants-in-aid rose from 132 in 1960 to 379 in 1968.[228] Total federal aid to the states rose from "$7 billion in 1960 to $24 billion in 1970."[229] As a result, the percentage of state budgets provided by the federal government increased by almost 35%.[230]

The scope of federal power expanded as well. The New Deal increased federal authority, but focused on national economic regulation and social insurance.[231] The Great Society, on the other hand, went much further by combining professional services, social sciences, and federal authority to address a variety of social problems.[232] It promoted "racial integration in housing and education," challenged sex discrimination, and instituted education, community development, and anti-poverty programs.[233] Through funding decisions or traditional regulations, the federal government began regulating an enormous number of activities that had been traditionally considered local: "elementary and secondary education, local law enforcement, libraries," fire control, environmental protection, and antipoverty programs.[234]

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227. TIMOTHY CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN 5 (1988).

228. *Id.* at 6.

229. *Id.*

230. *Id.*

231. *Id.* at 9.

232. CONLAN, *supra* note 108, at 8; *see also* Samuel H. Beer, *The Adoption of General Revenue Sharing: A Case Study in Public Sector Politics*, *in* 24 PUB. POL'Y 127, 160 (Lawrence D. Brown et al. eds., 1976).

233. CONLAN, *supra* note 227, at 9.

234. *Id.* at 6.

James Sundquist's analysis for the Brookings Institution in 1969 was a typical reaction. "In the nineteen-sixties," he wrote, "the American federal system entered a new phase."[235] Congress asserted national authority "in a wide range of governmental functions that until then had been the province, exclusively or predominantly, of state and local governments."[236] This "massive federal intervention in community affairs came in some of the most sacrosanct of all the traditional preserves of state and local authority," including "education[,] . . . local law enforcement[,] . . . manpower training and area economic development, . . . mass transportation, water systems, and sewage treatment plants."[237]

This was far more than a simple change in who paid. Dramatic alterations in the size and character of "federal grant-in-aid programs" had caused a "transformation of the federal system," Sundquist wrote.[238] Earlier grant-in-aid programs helped states address what were seen as local issues. As a result, federal review focused on ensuring efficiency, and "[p]olicy making [authority] . . . remained where it resided before the functions were assisted."[239] But the grants of the 1960s addressed national issues and "[a]chievement of a *national* objective requires close federal control over the content of the program."[240] The result was "new patterns of relationships" between levels of government.[241] Other scholars saw similar developments.[242]

2. Growing Concerns with Federal Dysfunction

Close observers of the federal system—including many who a decade earlier had been remarkably sanguine about American federalism—also became concerned that those increases in federal authority were producing fragmentation, disorganization, and inefficiency.[243] The Advisory Committee on Intergovernmental Relations was a bipartisan commission of congressmen, state officials, private citizens, and federal bureaucrats created in 1959 to recommend improvements to the federal

235. JAMES L. SUNDQUIST WITH DAVID W. DAVIS, MAKING FEDERALISM WORK: A STUDY OF PROGRAM COORDINATION AT THE COMMUNITY LEVEL 1 (1969).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 3.

240. *Id.* at 4–6.

241. *Id.* at 1.

242. Daniel Elazar argued in 1973 that the growth of project grants in the 1960s—grants which states and localities had to apply for rather than simply receive conditioned on following federal guidelines—"transferred the decision as to who would get what from the normal federal–state channels to Washington." Daniel J. Elazar, *Cursed by Bigness or Toward a Post-Technocratic Federalism*, 3 PUBLIUS 239, 281 (1973). Michael Reagan believed these changes were so significant that their emergence explained why Morton Grodzins, who died in 1964 "just before the explosive proliferation of grant programs, particularly those of a project nature," had misunderstood the nature of the federal system. MICHAEL D. REAGAN, THE NEW FEDERALISM 161 (1972); *see also* Bruce K. MacLaury, *Foreword* to GEORGE F. BREAK, FINANCING GOVERNMENT IN A FEDERAL SYSTEM vii (1980).

243. CONLAN, *supra* note 108, at 6–7.

system.[244] The General Accounting Office and Lynden Johnson's Bureau of the Budget agreed. The Bureau of the Budget found that the "complexity and fragmentation of federal grant programs . . . creates major problems of administration for both the federal government and local governments and inhibits the development of a unified approach to the solution of community problems."[245] Daniel Elazar saw a federal bureaucracy that had become so unwieldy it was beyond the control of the President.[246] Even Democratic politicians like Senator Edmund Muskie of Maine and LBJ's budget director began to question the ability of federal bureaucrats to oversee local plans and support decentralization.[247]

These concerns gained strength from other sources. Vietnam, stagflation, and Watergate decreased faith in all levels of government, but damaged the federal government most severely.[248] The shift of federal regulation into more broadly controversial topics was also damaging. In the 1950s and early 1960s, the most obvious extensions of federal power were aimed at de jure segregation and massive resistance in the South. Though many Southerners clearly opposed federal authority, the violence of fire hoses and police dogs made clear for others the need for federal intervention. But after the mid-1960s federal intervention turned towards de facto segregation, most visibly the use of busing to address school segregation. That issue was a complicated one for many and created new doubts about the effectiveness of expanding federal power. "The controversy over busing," wrote one commentator, "shows perfectly the difficulties to be encountered, once the first step is taken down the road of adding flesh to the constitutional bones of federalism."[249]

3. Democratic and Competent States

Doubts about federal competence rose in tandem with faith in the competence of state government. An important reason for the improvements in state government was, ironically, federal intervention. The Warren Court's apportionment decisions made woefully gerrymandered state legislatures more responsive to the popular will,[250] while its criminal procedure decisions removed some of the state executives' worst excess-

244. *What Is ACIR?*, Archive, U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL REL., http://www.library.unt.edu/gpo/acir/Default.html (last visited Apr. 24, 2014).

245. CONLAN, *supra* note 108, at 7 (omission in original) (quoting ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, IMPROVING FEDERAL GRANTS MANAGEMENT: THE INTERGOVERNMENTAL GRANT SYSTEM—AN ASSESSMENT AND PROPOSED POLICIES 11–12 (1977)) (internal quotation mark omitted).

246. Elazar, *supra* note 242, at 281.

247. CONLAN, *supra* note 108, at 7.

248. *See* TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE (1993); JOHN ROBERT GREENE, AMERICA IN THE SIXTIES 135 (2010); KIM MCQUAID, THE ANXIOUS YEARS: AMERICA IN THE VIETNAM-WATERGATE ERA, 319–20 (1989); Jerald G. Bachman & M. Kent Jennings, *The Impact of Vietnam on Trust in Government*, 31 J. SOC. ISSUES 141, 141 (1975).

249. Richard H. Leach, *Federalism: A Battery of Questions*, 3 PUBLIUS 11, 22 (1973).

250. Mavis Mann Reeves, *The States as Polities: Reformed, Reinvigorated, Resourceful*, 509 ANNALS AM. ACAD. POL. & SOC. SCI. 83, 86–87 (1990); Whittington, *supra* note 104, at 521.

es.[251] The requirements of administering federal grant programs also encouraged states to improve their administrative capacities.[252] Other developments included states instituting annual rather than semiannual legislative sessions.[253]

But more important to growing faith in state government was the belated decision of the Southern state governments to prosecute the racist violence. The Civil Rights Act of 1968 gave the federal government new tools to prosecute racist violence, but the law went largely unused because growing fears of a breakdown of law and order led Southern states to begin prosecuting and convicting perpetrators of that violence.[254] In stark contrast to the 1950s and early 1960s, Southern authorities charged 132 members of the KKK with "378 felonies and serious misdemeanors" between March 1967 and March 1969.[255] And Southern juries often returned convictions.[256] "By September 1973 the *New York Times* was able to report the 'virtual disappearance' . . . of unpunished [racist violence in the South]."[257]

4. Weak States and Special Interests

As doubts rose that the accelerating shift of governing authority to Washington was a functional response to the challenges of the time, changes in national politics offered a way to explain why the shift was continuing: the collapse of the political power of the states and the rising influence of national interest groups. Many observers saw how television and the age of mass campaigns had increased the influence of national interest groups. They also regularly noted the growing evidence that state political parties were losing influence over the national government in response to developments in state politics and the structure of Congress itself. The structures most people had identified as the central political safeguards of federalism, in other words, were eroding.

Federal action in the 1960s may have made state governments more competent, but it also reduced the ability of state political parties to influence their federal representatives. The Warren Court apportionment decisions made it more difficult to use gerrymandering to shape the preferences of a state congressional delegation,[258] as did the 1965 Voting

251. MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 96–97 (1998).

252. Samuel H. Beer, *The Modernization of American Federalism*, 3 PUBLIUS 49, 83 (1973); Reeves, *supra* note 250, at 85; Whittington, *supra* note 104, at 521.

253. Reeves, *supra* note 250, at 88; Purcell, *supra* note 14, at 156–57.

254. BELKNAP, *supra* note 199, at 237–42.

255. *Id.* at 234.

256. *Id.* at 235.

257. *Id.* at 232.

258. GORDON E. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT 40–41 (1966); Alexander M. Bickel, *The Supreme Court and Reapportionment*, *in* REAPPORTIONMENT IN THE 1970S 57, 61 (Nelson W. Polsby ed., 1971).

Rights Act and the prohibition of poll taxes and literacy tests.[259] Reforms in Congress had a similar impact. The Legislative Reorganization Act of 1970 ended the era when powerful committee chairmen appointed by seniority could bend the legislative agenda to the interests of their local constituents with impunity.[260] Those changes became clear in 1974 when the senior chairs of the Agriculture, Armed Services, and Banking Committees were deposed.[261] Committee chairmen learned to be much more responsive to the party caucus, which reduced the influence of the state party.[262]

The decline of state parties made them less able to mobilize voters and further undermined their influence. "[O]ur parties," wrote Samuel Beer, "have entered a state of decline."[263] Increases in ticket-splitting, rising numbers of independents, and related changes were "abundantly in evidence."[264] As television advertising became critical to political campaigns, fundraising increased in importance relative to party action and legislators quickly found that national interest groups—the AARP, the NRA, the Sierra Club, the AFL–CIO, and the Chamber of Commerce—could more easily contribute money.[265] As a result, those national constituencies and their national interests gained salience. As the state parties lost influence over their representatives, their ability to use congressional oversight to influence the federal bureaucracy declined as well.[266] The impression of limited congressional control over the bureaucracy was strengthened by growing concerns with "iron triangles" in which congressmen had to share influence with interest groups and state and federal administrators.[267]

D. The Consensus Fractures

These developments led many to re-evaluate their belief that the American federal system was one characterized by shared governing authority.[268] Not everyone changed their mind,[269] certainly. But many

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259. Katzenbach v. Morgan, 384 U.S. 641, 654–56 (1966) (upholding the suspension of literacy tests); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (prohibiting poll taxes).

260. CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 35 (3d ed. 1997).

261. *Id.* at 38.

262. *Id.*

263. Beer, *supra* note 252, at 94.

264. *Id.*

265. *See* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 862–65 (1979).

266. *Id.*

267. *See generally* HAROLD SEIDMAN, POLITICS, POSITION AND POWER 271–77 (1st ed. 1970).

268. *See* Robert J. Pranger, *The Decline of the American National Government*, 3 PUBLIUS 97, 115 (1973) ("Until recently a profound nationalistic enthusiasm was widespread in the United States. Today there is a much more reserved attitude toward the nation, especially among educated people. Why? Some have blamed the Vietnam War or a more general technocratic organization that has produced citizen alienation and powerlessness. Another explanation might be that the national center can no longer generate nationalistic enthusiasm because it no longer operates as a center for the nation as a whole.").

became convinced that states did not have the governing authority the political safeguards thesis predicted they should. By 1973, Michael Reagan, who was a proponent of greater nationalization,[270] was persuaded Grodzins and others had badly misunderstood the way the American federal system functioned. They had, he argued, "confused sharing of functions with sharing of power."[271] The system he saw was so clearly not a system of shared governing authority—even if it was a system of shared administration—that it needed a new name. "Cooperative" and "creative" federalism were not accurate descriptions.[272] "[P]ermissive federalism," Reagan suggested, was more accurate because states exercised real authority only with the permission of the federal government.[273] What real power states had was vestigial, and effectively meaningless.[274]

A strong indication of the effect changed circumstances had on faith in the political safeguards thesis was the changed perspective of Daniel Elazar, a strong proponent of Morton Grodzin's sharing approach in the early 1960s. By the early 1970s, Elazar believed, with Reagan, that the sharing of functions did not indicate the sharing of real power.[275] It was possible, said Elazar, in the 1960s and 70s to "confuse all kinds of federal-state-local interaction with 'cooperation' whether the interaction involved federal coercion or not."[276] He ultimately rejected Grodzins' sharing hypothesis. "When Grodzins wrote" in the 1950s, he claimed,

> there were still substantial constitutional and other kinds of barriers (including party, which he emphasized) to centralization of power in Washington, whether for its direct exercise or for the sake of decentralization along presumably more rational lines. Today, those barriers have by and large disappeared. Powers can be transferred to Washington in one way or another and, once transferred, are leading to token decentralization that becomes, in reality, the greater exercise of those powers by a newly enhanced national government.[277]

Theodore Lowi's thought followed a similar line. His 1969 *The End of Liberalism* saw a lack of centralized control as the hallmark of American government but by 1978 emphasized the power and importance of a

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269. JAMES A. MAXWELL & J. RICHARD ARONSON, FINANCING STATE AND LOCAL GOVERNMENTS 252–53 (3d ed. 1977).
270. REAGAN, *supra* note 242, at 53.
271. *Id.* at 161.
272. *Id.* at 163 (internal quotation mark omitted).
273. *Id.* (internal quotation marks omitted).
274. *Id.* at 13.
275. Elazar, *supra* note 242, at 244.
276. *Id.* at 245.
277. *Id.* at 243.

central national state.[278] Others—even those who supported that centralization—noted similar trends.[279]

A 1973 symposium on the state of the American federal system is another indicator.[280] An animating question of the conference was whether "rather clearly definable limitations on federal and state action" had been removed and whether "our present mechanisms for making policy constitutionally and/or prudentially satisfactory in order to maintain our federal system[.]"[281] Martin Landau had a clear answer to the first issue: "It is plain to see, however, that the nationalization . . . of authority has all but stripped the states of their independence. . . . And there is little doubt today that any of the residues of the classical federal relationship can be set aside by the national government."[282]

To conclude that the political process no longer protected state autonomy did not require one to believe that state autonomy needed judicial protection. Many observers who saw a decline in the real governing authority of the states neither supported decentralization nor called for a return of constitutional federalism.[283] Michael Reagan, most notably, remained opposed to constitutional federalism and even decentralization, as did other prominent voices, including William Riker and, later, Jesse Choper.[284]

The decline of what had been seen as the most important of the political safeguards of federalism nevertheless explained to some why the American government was transferring authority away from increasingly competent states to the increasingly incompetent federal government. And as doubts about the political safeguards thesis grew, so did calls for the return of constitutional federalism.

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278. Scheiber, *supra* note 138, at 673 (citing THEODORE J. LOWI, THE END OF LIBERALISM 26 (1969)); Theodore J. Lowi, *Europeanization of America? From United States to United State*, *in* NATIONALIZING GOVERNMENT: PUBLIC POLICIES IN AMERICA 15, 18 (Theodore J. Lowi & Alan Stone eds., 1978).

279. Scheiber, *supra* note 138, at 673 (citing Martin Landau, Baker v. Carr *and the Ghost of Federalism*, *in* EMPIRICAL DEMOCRATIC THEORY 131, 137 (Charles Cnudde & D.E. Neubauer eds., 1969); Henry Abraham, *Effectiveness of Governmental Operations*, 426 ANNALS 81, 94 (1976)).

280. Daniel J. Elazar, *First Principles*, 3 PUBLIUS 1, 1 (1973).

281. *Id.* at 7.

282. Martin Landau, *Federalism, Redundancy and System Reliability*, 3 PUBLIUS 173, 191–92 (1973).

283. Richard Leach argued in 1973 that the judiciary was too involved in questions of federalism because it limited the authority of the states and encouraged less judicial involvement. Leach, *supra* note 249, at 23. Though even he admitted that one "judicial review has a merit" in that it can correct the overreach by Congress and the executive. *Id.* "The police power was not delegated to Congress . . . . [A]s a part of the reservoir of state power, it permits a great deal of flexibility at the state level in the development of government policy," a flexibility Leach believes Congress and the President are eliminating, a shift antithetical to the goals of the founders and good government. *Id.* at 23–25.

284. REAGAN, *supra* note 242, at 52–53; RIKER, *supra* note 158, at 155; Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1555 (1977).

In the legal academy, scholars like Alexander Bickel and Phillip Kurland, most notably, began to complain about excessive nationalization.[285] Bickel's *The Supreme Court and the Idea of Progress* criticized the Warren Court for failing to defer to the democratically elected branches of both nation and states.[286] Kurland made similar claims in 1970 in *Politics, the Constitution, and the Warren Court* and spoke sorrowfully of the elimination of federalism elsewhere.[287] In *Storm over the States*, Democratic presidential candidate Terry Sanford argued a "new federalism" was necessary to free all levels of government from the special interests.[288]

Other observers went a step beyond critique and urged the judiciary to rediscover constitutional federalism. One of the animating questions of the 1973 conference on the state of American federalism was, "Should we consider placing an increased emphasis upon constitutional barriers . . . ?"[289] Martin Diamond called for a return to the doctrine of enumerated powers.[290] Daniel Elazar, too, supported such a move. The founders, he wrote, had "wisely noted" that "the preservation of constitutional barriers is necessary . . . [g]iven the nature of men and the problems of maintaining restraint under political pressure."[291] He thus concluded that "the re-establishment of constitutional restraints in areas other than those linked with the Bill of Rights should be a high priority matter."[292]

IV. *NATIONAL LEAGUE OF CITIES* AND THE POLITICAL SAFEGUARDS THESIS INSIDE THE SUPREME COURT

The internal papers of the Supreme Court indicate that the same changes that led observers of the federal system outside the Court to lose faith in the political safeguards thesis had the same effect on the Justices inside the Court. Those changes framed the arguments made by the National League of Cities and supporting amici. They also convinced Justice Lewis Powell, who saw his doubts about the theory epitomized in *NLC* and then played the central role in building the coalition that, for the first time in forty years, struck down an exercise of Congress's commerce power on federalism grounds.

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285. Scheiber, *supra* note 138, at 666, 674 n.8.

286. ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 173–81 (1970); *see also* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 120–21 (1975); Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 546 (1976).

287. PHILIP B. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 96–97 (1970); *see also* PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 5 (1978); Philip B. Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 621 (1968).

288. TERRY SANFORD, STORM OVER THE STATES 207–12 (1967).

289. Elazar, *supra* note 280, at 7.

290. Martin Diamond, *The Forgotten Doctrine of Enumerated Powers*, 6 PUBLIUS 187, 188, 193 (1976).

291. Elazar, *supra* note 242, at 252.

292. *Id.* at 253.

A. Fry v. United States*: Laying the Groundwork*

Powell's interest in *NLC* and his central role in building a coalition willing to revive constitutional federalism are revealed by the debate inside the Court over *Fry v. United States*, a case from the previous term that was decided in the midst of arguments over *NLC*. *Fry* concerned a federalism challenge to the Economic Stabilization Act of 1970 (ESA).[293] The ESA aimed to slow runaway inflation by empowering a presidentially appointed Pay Board to deny wage increases by both public and private employers.[294] Ohio brought suit claiming the law could not be constitutionally applied to the states.[295] The Tenth Amendment and the structure of the Constitution, it argued, did not allow Congress to interfere with "sovereign state functions," which included the authority to set wages for at least some of the employees covered by the statute.[296]

From the outside, the Court seemed to have few problems rejecting Ohio's claim. Justice Marshall's brief opinion for seven Justices held that the case was controlled by *Maryland v. Wirtz*, which "reiterated the principle that States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status."[297] Justice Douglas concurred on the grounds that the appeal was moot since the ESA had expired by the time the Court considered the case.[298] Justice Rehnquist's long dissent,[299] which anticipated much of his majority opinion in *NLC*, seemed both an outlier and, in retrospect, evidence of his leadership on federalism issues.

Internal documents, however, tell a different story about the leading voice on the Court and how difficult *Fry* was to decide. From the start there was interest in reconsidering judicial limits to the commerce power in *Fry*. Justices Rehnquist, Douglas, Stewart, and Powell provided the four votes for certiorari.[300] Rehnquist's dissent made his interest clear.[301] Justices Douglas and Stewart likely voted for certiorari so they could consider reversing *Wirtz*, in which they had both dissented seven years earlier.[302] Distinguishing *Wirtz* certainly seemed difficult to the writer of the certiorari memo, who thought the government would win "hands down" if *Wirtz* were not overruled.[303] Justice Powell's notes indicate he

293. Fry v. United States, 421 U.S. 542, 543–44 (1975).
294. *Id.* at 548.
295. *Id.* at 547.
296. *Id.*
297. *Id.* at 548.
298. *Id.* at 549 (Douglas, J., concurring).
299. *Id.* at 557–58 (Rehnquist, J., dissenting).
300. Justice Lewis F. Powell, *Fry* Certiorari Vote Sheet, *in* Powell Papers, *supra* note 23.
301. *Fry*, 421 U.S. at 557–58 (Rehnquist, J., dissenting).
302. Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting) *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).
303. Pierce O'Donnell, Certiorari Memorandum (Dec. 31, 1974), *in* Powell Papers, *supra* note 23; Preliminary Memorandum for February 15, 1974 Certiorari Conference 5 (Jan. 29, 1974), *in* THE

was ready to consider placing limits on Congress. "If [the] Commerce Clause," he wrote, "allows [the] Fed[eral] [g]ov[ernment] to fix state salaries, there's not much left to [f]ederalism. Will state taxes & charges for municipal services be next?"[304] The *Fry* case, he insisted, needed to be discussed at conference.[305]

That interest ebbed following oral argument. At the initial conference, no one voted to invalidate the ESA and the opinion was assigned to Justice Marshall.[306] But the breadth of Justice Marshall's first draft and Justice Powell's interest in the opportunity to re-establish constitutional federalism in *NLC* nearly cost Marshall his majority.

Marshall's first circulated draft was far more deferential to Congress than his final opinion. The draft asserted that *Wirtz* had confirmed *United States v. California*'s holding that the sovereign governmental functions of states were just as amenable to regulation under the Commerce Clause as their proprietary functions.[307] As a result, the ESA, which everyone admitted was a regulation of interstate commerce, was clearly constitutional as applied to the states.[308] Justices White, Stewart, and Blackmun quickly offered to join the opinion.[309] Burger asked only for minor changes.[310]

Powell, however, challenged Marshall's interpretation of *Wirtz* in order to keep the Court's options open for *NLC*. In a memo circulated to the Court, he asked Marshall to narrow his draft to focus on the temporary, emergency nature of the ESA.[311] More importantly, he asked him to remove his discussion of the line between "proprietary" and "governmental" state functions.[312] *Wirtz*'s discussion of that issue, Powell argued, was merely dicta and removing it would "leave[] open the possibility of distinguishing *Wirtz* in *National League of Cities*," as had been discussed at the last conference.[313] If Marshall was unwilling to change

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PAPERS OF HARRY A. BLACKMUN (on file with the Library of Congress) [hereinafter BLACKMUN PAPERS].

304. Pierce O'Donnell, Preliminary Memorandum (Jan. 29, 1974), *in* Powell Papers, *supra* note 23 (handwritten note of Justice Powell).

305. *Id.*

306. Justice Lewis F. Powell, Jr., *Fry* Certiorari Vote Sheet, *in* Powell Papers, *supra* note 23.

307. Justice Thurgood Marshall, Third Draft, *Fry v. United States* 2 (Mar. 25, 1975), *in* THE PAPERS OF WILLIAM J. BRENNAN (on file with the Library of Congress) [hereinafter BRENNAN PAPERS].

308. *Id.* at 8.

309. *See* Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall (Jan. 9, 1975), *in* Powell Papers, *supra* note 23; Letter from Justice Byron White to Justice Thurgood Marshall (Jan. 6, 1975), *in* Powell Papers, *supra* note 23; Letter from Justice Potter Stewart to Justice Thurgood Marshall (Jan. 6, 1975), *in* THE PAPERS OF THURGOOD MARSHALL (on file with the Library of Congress) [hereinafter MARSHALL PAPERS].

310. Letter from Chief Justice Warren E. Burger to Justice Thurgood Marshall (Jan. 8, 1975), *in* MARSHALL PAPERS, *supra* note 309.

311. Letter from Justice Lewis F. Powell, Jr. to Justice Thurgood Marshall 2 (Jan. 14, 1975), *in* MARSHALL PAPERS, *supra* note 309.

312. *Id.*

313. *Id.*

the opinion, Powell concluded, he would have to write a separate concurrence.[314]

Powell's note nearly cost Marshall his majority. Justices Rehnquist and Blackmun quickly offered their support for the changes.[315] Rehnquist even wrote that he might have to dissent, something that he seems to have considered only after reading Powell's note.[316] Marshall believed Powell had coordinated the challenge to his opinion with Justice Blackmun, and was furious.[317] His curt reply to Powell, which Blackmun believed offensive, did not help.[318] *Fry*, Marshall's memo insisted, had been "cut to the bone" and was "as narrow a holding as I can imagine."[319] It was not the breadth of his *Fry* draft that suggested *NLC* was being prejudged, Marshall continued, it was Powell's suggestion that the draft be changed.[320]

Things only got worse for Marshall after his note. The next day, Rehnquist committed to dissent.[321] In February, Douglas circulated his brief concurrence urging dismissal.[322] In March, Powell circulated a brief concurrence that made clear his belief that state sovereignty set some limits on Congress's commerce power.[323] When Blackmun saw Powell's concurrence, he formally withdrew his joinder to Marshall's opinion and joined Powell.[324] Burger soon offered to join Powell as well.[325] Given Stewart's decision to join Douglas in dissent in *Wirtz*, Marshall had every reason to worry about losing him to Powell as well.

As his 9–0 majority opinion careened towards becoming a concurrence for just three Justices, Marshall agreed to Powell's changes. He removed the discussion of the proprietary-governmental distinction and integrated much of Powell's circulated concurrence.[326] Though he was

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314. *Id.*

315. Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall (Jan. 15, 1975), *in* MARSHALL PAPERS, *supra* note 309; Letter from Justice William H. Rehnquist to Justice Thurgood Marshall (Jan. 14, 1975) *in* MARSHALL PAPERS, *supra* note 309.

316. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall (Jan. 14, 1975), *in* MARSHALL PAPERS, *supra* note 309.

317. Note for File from Justice Harry A. Blackmun (April 8, 1975), *in* BLACKMUN PAPERS, *supra* note 303.

318. *Id.*

319. Letter from Justice Thurgood Marshall to Justice Lewis F. Powell (Jan. 16, 1975), *in* BLACKMUN PAPERS, *supra* note 303.

320. *Id.*

321. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall (Jan. 17, 1975), *in* BLACKMUN PAPERS, *supra* note 303.

322. Letter from Justice William O. Douglas to Justice Thurgood Marshall (Feb. 11, 1975), *in* BLACKMUN PAPERS, *supra* note 303.

323. Justice Lewis F. Powell, Second Draft, Concurring Opinion, *Fry v. United States* (Mar. 20, 1975), *in* BLACKMUN PAPERS, *supra* note 303 (withdrawn on April 8, 1975).

324. Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall (Mar. 20, 1975), *in* BLACKMUN PAPERS, *supra* note 303.

325. Letter from Chief Justice Warren E. Burger to Justice Lewis F. Powell (Mar. 27, 1975), *in* BLACKMUN PAPERS, *supra* note 303.

326. Fry v. United States, 421 U.S. 542, 548 (1975).

prepared to publish his original opinion if he picked up no new votes, it was unnecessary.[327] His changes were sufficient to bring everyone but Rehnquist back on board.[328] With the briefing in *NLC* already underway, however, it was clear *Fry* was only the beginning. There seemed a clear possibility that Powell could find as many as six votes to re-establish constitutional federalism under the right circumstances.[329]

B. Localism, Judicial Review, and Lewis Powell

Powell's interest in federalism questions is easy to understand. His biographer John Jefferies describes his long-standing belief in the importance of local government, local community, and especially neighborhood schools.[330] "He venerated the traditional connectedness of home, church, and school[, and] . . . feared the rootlessness, the anonymity, the impersonality of life in modern cities."[331] In his opinions, these concerns revealed themselves most clearly in his evaluation of court-ordered busing as a tool to achieve racial integration.[332] For Powell, Jefferies wrote, "the neighborhood school[s] epitomized the values of community, of belonging, of cooperation [and] . . . common endeavor for the public good."[333] And he generally opposed busing because it undermined those values.[334] He supported deference to state and local control in other circumstances, too. His majority opinion in *San Antonio v. Rodriguez*[335]—a class action suit by poor schoolchildren challenging a property-tax-based school financing system on equal protection grounds—protected the flexibility of the local school boards Powell had once been a member of.[336] "The ultimate wisdom," he wrote,

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327. Memorandum from Justice Thurgood Marshall to Justices William O. Brennan, Potter Stewart, and Byron White (Mar. 25, 1975), *in* MARSHALL PAPERS, *supra* note 309; Letter from Justice Lewis F. Powell, Jr. to Justice Thurgood Marshall (Apr. 8, 1975), *in* MARSHALL PAPERS, *supra* note 309.

328. Note for File from Justice Harry A. Blackmun (Apr. 8, 1975), *in* BLACKMUN PAPERS, *supra* note 303 ("Now [Justice Marshall] has come around and, hopefully, should have a 7 to 2 vote with [Justice Rehnquist] dissenting and [Justice Douglas] preferring to dismiss.").

329. Powell led the charge to limit *Fry*; Burger and Blackmun supported him; Rehnquist dissented in *Fry*; and Stewart and Douglas dissented in *Wirtz*.

330. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 285 (1994).

331. *Id.* at 296–97. In a speech to the American Bar Association, Powell lamented the increasing disconnection between citizens and the "[t]eachers, parents, neighbor[hood]s, ministers, employers," who were the "personal authorities [that] once gave direction to our lives." *Id.* at 297 (alteration in original) (quoting Justice Lewis F. Powell, Jr., Prayer Breakfast Speech to the American Bar Association (Aug. 13, 1972)) (internal quotation marks omitted). Those relationships, Powell said, "were something larger than ourselves, but never so large as to be remote, impersonal, or indifferent. We gain[] from them an inner strength, a sense of belonging, as well as of responsibility to others." *Id.* (quoting Justice Lewis F. Powell, Jr., Prayer Breakfast Speech to the American Bar Association (Aug. 13, 1972)) (internal quotation marks omitted).

332. *Id.* at 296–97.

333. *Id.* at 297.

334. *Id.* at 285; *see, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 246 (1973) (Powell, J., concurring in part and dissenting in part).

335. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

336. *Id.* at 58–59.

> [of] these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the[se] issues. In such circumstances, the judiciary is well advised to refrain from interposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions . . . .[337]

"We are unwilling," Powell continued, "to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 [s]tates."[338]

There was a crucial difference between a case like *San Antonio* and *NLC*, however. Both certainly activated Powell's concern for local government and local community. But in cases like *San Antonio*, Powell's concern with local community was reinforced by his concern with judicial deference to the political branches. Protecting local autonomy in *NLC* would require him to invalidate a law passed by Congress. It would require, in other words, the very kind of judicial activism that was also a central concern of Justice Powell.[339] That concern would have been acute in *NLC* because invalidating the law would require overturning a forty-year-old precedent affirmed only eight years earlier.

C. The Political Safeguards Thesis in National League of Cities

Despite those concerns, Powell believed *NLC* required the return of constitutional federalism. "This is the one we've been waiting for," wrote Penny Clark, Powell's clerk for the arguments in *Fry* and the briefing in *NLC*.[340] And memoranda from inside the Court indicate that he believed it was the one he had been waiting for because it embodied his doubts about the political safeguards thesis.[341]

Certainly the changes that influenced the growing skepticism of observers of the federal system outside the Court were also apparent to Powell and his colleagues. Improvements in state government, the rising power of interest groups, and growing federal administrative dysfunction had been issues of public comment since the 1960s. Those issues were raised by academic and public discussions of LBJ's "Creative Federalism" agenda,[342] the Intergovernmental Relations Committee chaired by

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337. *Id.* at 43.

338. *Id.* at 55. Powell's majority opinion in *Warth v. Seldin* adopted a similar approach in denying standing to a challenge by citizens to the zoning decisions of the town of Penfield, which they claimed excluded low-income people in violation of federal constitutional and statutory rights. 422 U.S. 490, 493 (1975). Ruling otherwise, Powell wrote, would call upon courts to decide questions "other governmental institutions may be more competent to address." *Id.* at 500.

339. JEFFRIES, *supra* note 330, at 273.

340. Letter from Penny Clark to Justice Lewis F. Powell, Jr. (Jan. 24, 1975), *in* Powell Papers, *supra* note 23.

341. Memorandum for Conference from Justice Lewis F. Powell, Jr. (Apr. 17, 1975), *in* Powell Papers, *supra* note 23.

342. *See generally* CREATIVE FEDERALISM (Donald E. Nicoll ed., 1967).

Senator Edmund Muskie,[343] the Advisory Committee on Intergovernmental Relations,[344] and Richard Nixon's New Federalism agenda.[345] To give just a few examples: in 1967 the *New York Times* covered former North Carolina Governor Terry Sanford's critique of the federal system, *Storm over the States*;[346] in 1970, the *Washington Post* discussed James Sundquist's *Making Federalism Work*, a clear example of changing views on American federalism discussed in Section III;[347] and in 1972, *Washington Post* editorialist David Broder discussed the Advisory Committee on Intergovernmental Relations and its recognition of the sharp increase in "political, popular and academic discussion[s] of American federalism."[348]

The success of Southern state governments in prosecuting the violence of white supremacists would have been even clearer, and perhaps even more important to Powell who had served on the Richmond School Board following *Brown* and was, wrote his biographer, "genuinely and passionately opposed to massive resistance"[349] and "plainly appalled by the threat to the rule of law" it created.[350] Those changes, in other words, would have made Powell and his colleagues doubt that the political safeguards thesis accurately described the system of American federalism, just as they had for many observers outside the Court.

The doubts Justice Powell and his colleagues had about the political safeguards thesis would have been strengthened by the briefs in *NLC*. The National League of Cities and supporting amici made careful doctrinal arguments, but they also fanned doubts about the political safeguards thesis with empirical assertions that would have been unconvincing two decades earlier. Federal regulations were inflexible, undemocratic, and ineffective in contrast to flexible, democratic, and effective state govern-

343. *Creative Federalism Part 1: The Federal Level: Hearing on S. 3509 and S.J. Res. 187 Before the Subcomm. on Intergovernmental Relations of the Comm. on Gov't Operations*, 89th Cong. (1966); *Creative Federalism Part 2-A: The State-Local-Regional Level: Hearing on S. 671 and S. 698 Before the Subcomm. on Intergovernmental Relations of the Comm. on Gov't Operations*, 90th Cong. (1967); *Creative Federalism Part 2-B: The State-Local-Regional Level: Hearing on S. 671 and S. 698 Before the Subcomm. on Intergovernmental Relations of the Comm. on Gov't Operations*, 90th Cong. (1967).

344. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 195.

345. President Richard Nixon, Address to the Nation on Domestic Programs (Aug. 8, 1969) (transcript available at http://www.presidency.ucsb.edu/ws/?pid=2191).

346. Peter Kihss, *Report Demands Big Effort to Revitalize States*, N.Y. TIMES, Oct. 16, 1967, at 22.

347. Henry Owen, *Federal Structure in Need of Reform*, WASH. POST, Mar. 12, 1970, at A18.

348. David S. Broder, *The Crisis Continues*, WASH. POST, Mar. 14, 1972, at A19 (quoting the Advisory Commission on Intergovernmental Relations' thirteenth annual report) (internal quotation marks omitted); *see, e.g.*, Ernest Holsendolph, *Congress Urged to Renew Revenue-Sharing Program*, N.Y. TIMES, Nov. 4, 1974, at 1.

349. JEFFRIES, *supra* note 330, at 179.

350. *Id.* at 149.

ance. The 1974 FLSA Amendments, they implied, were passed only because of the power of national interest groups.[351]

Criticism of the FLSA amendments as inflexible and ineffective was woven throughout the briefs. The law created "rigid nation-wide uniform rules" and "centralize[d] power in [the Secretary of Labor] to impose high cost, rigid, nation-wide uniformity, wiping out small cost arrangements developed by experience to meet unique State and local needs."[352] They caused "chaos," "conflict," "confusion,"[353] "duplication, uncertainty, litigation, and damage to fiscal integrity" of the states.[354] To understand the law, states, counties, and cities had to wade through "691 pages of a volume of Title 29 of the Code of Federal Regulations," 85% of which did not apply to them at all because they were written to regulate private industry.[355] The federal government, the briefs complained, "does not possess all the knowledge, wisdom, fairness and reasonableness" about the best terms of employment for state employees.[356] In fact, the evidence was to the contrary. The Department of Labor's Wages and Hours Division, which was slated to oversee wage rules for the states, had already been criticized for "acting to retard progress and diversity in flexible scheduling of both Federal and State and local employees."[357]

Even worse, the rules were unnecessary. "[T]his centralization," argued the briefs, "is not mandated to wipe out substandard labor conditions as such conditions do not exist among State[] and local Governments. They pay fair and reasonable salaries, fix reasonable hours and have civil service, public sector collective bargaining and other laws insuring that their employees [receive] . . . fair treatment."[358] And Congress knew it. It had "ample and competent evidence that extension of the Act to State and local Government employees was . . . unnecessary."[359] The act was so irrational that even the lawyers for the government could cite "no evil of substance that the Act will cure . . . [or] any wrong of substance that the Act will right."[360]

Perhaps worst of all, the law was undemocratic. Under the FLSA, wage decisions would be "a policy decision of the Labor Department mandated without the consideration of one elected official and without

351. *See* Brief for Appellants, *supra* note 31, at *18–24.
352. *Id.* at *32, *42, *44.
353. *Id.* at *32.
354. Reply Brief at *4, Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (No. 74-878), 1975 WL 173803, at *4.
355. Brief for Appellants, *supra* note 31, at *49.
356. *Id.* at *56–57.
357. *Id.* at *88.
358. *Id.* at *44.
359. *Id.* at *83.
360. Reply Brief, *supra* note 354, at *3.

the approval of one constituent."[361] State and local control, in contrast, provided "'ballot box control' [of] . . . the extent and nature of State and City Government services."[362] In sum, the law was a "nullification of the People's power."[363] It shifted power from the "People in each State" who had exercised "ballot box control upon the services they need" to federal bureaucrats and courts.[364] Henceforth, wages would be set by "Congress, the Secretary of Labor, or the Federal Courts free from ballot box control by the People in the States and Cities."[365]

Why was such an unproductive act passed when "[t]he history of State and local Government in this Nation has been one of flexibility, adaptation to change, and experimentation"?[366] The briefs offered a simple answer: the political power of labor unions. The only supporters of the act mentioned by the brief were five major unions—the AFL-CIO, SEIU, AFSCME, International Association of Fire Fighters, and International Conference of Police Associations—while it was opposed by "[g]overnments at all levels," including the National League of Cities, the U.S. Conference of Mayors, twenty-nine individual cities, both of President Nixon's Secretaries of Labor, and even the President himself, all of whom had argued that the extension of the Act was unnecessary.[367]

These arguments convinced Powell that *NLC* embodied his doubts about the political safeguards. A memorandum he prepared before the final discussions and vote in the case discussed the doctrinal complexities raised by the case, but more importantly it made clear why he believed an appropriate doctrine would limit Congress's commerce power: his rejection of the political safeguards thesis. The facts of the case before him, he believed, demonstrated the theory's weakness. "One can argue," he wrote, "that the states can 'trust' Congress not to go so far" as to eliminate the right of the States to make their own personnel decisions.[368] "But," he continued,

> the duty of this Court is to apply constitutional principle rather than trust to legislative forbearance. The extension of FLSA to the states in 1974 is an example. Judging by the briefs in this case, virtually every state and city in the nation opposes this legislation. The National Governors Conference and the National League of Cities are parties. Two members of the Cabinet testified against the 1974

361. Supplemental Brief for Appellants on Reargument at *50, Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (No. 74-878), 1976 WL 181531, at *50.

362. Brief for Appellants, *supra* note 31, at *113.

363. Reply Brief, *supra* note 354, at *26.

364. *Id.* at *25.

365. *Id.*

366. Brief for Appellants, *supra* note 31, at *82.

367. *Id.* at *18–21.

368. Notes for Use at Conference by Justice Lewis F. Powell, Jr. (Mar. 4, 1976), *in* Powell Papers, *supra* note 23.

> Amendment and the President vetoed it. Yet, the political muscle of organized labor outweighed what appeared to be overwhelming local political views to the contrary.[369]

Powell, in short, believed *NLC* embodied the argument against the political safeguards thesis: the power of national interest groups overcame expert opinion and the overwhelming views of state and local governments to muscle a dysfunctional law through Congress. And that conclusion helped him convince his colleagues to invalidate an exercise of Congress's commerce power on federalism grounds for the first time in four decades.

D. National League of Cities *Decided*

Powell's plans for *NLC*, however, were scrambled and nearly derailed when William Douglas's stroke led to the appointment of John Paul Stevens. Douglas suffered his stroke on January 1, 1975, after the initial briefing but before oral arguments in *NLC*.[370] In recognition of his absence and diminished capacity, his colleagues postponed decision in any case that might turn on Douglas's vote.[371] The result was two oral arguments and two votes in *NLC*: the first with Justice Douglas formally on the Court, the second after Republican Gerald Ford had appointed Stevens to Douglas's seat. These votes indicate that replacing a Democratic with a Republican appointee almost ended the return of constitutional federalism before it began.[372]

Douglas's stroke kept him from the first conference, but the vote was four to three with one abstention. Burger, Powell, Rehnquist, and Blackmun voted to reverse on the grounds that *Wirtz* could be distinguished.[373] Brennan, White, and Marshall voted to affirm on the grounds that it could not.[374] Justice Stewart was undecided. *Wirtz*, he believed, could not be distinguished, and though he had earlier dissented in *Wirtz*, he was unwilling to provide the fifth vote to overrule it.[375] As a result of the agreement to postpone any decision in which Douglas's vote would be determinative, Stewart's position—perhaps intentionally—required reargument.

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369. Notes for Use at Conference by Justice Lewis F. Powell, Jr. (Mar. 4, 1976), *in* Powell Papers, *supra* note 23.

370. HOYT, *supra* note 132, at 159.

371. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 358 (1979).

372. *See* Conference Voting Sheet from the Supreme Court Conference on *National League of Cities v. Dunlop* (Apr. 18, 1975), *in* Powell Papers, *supra* note 23; Letter from the Supreme Court Conference on *National League of Cities v. Dunlop* (Mar. 5, 1976), *in* Powell Papers, *supra* note 23.

373. *See* Conference Voting Sheet from the Supreme Court Conference on *National League of Cities v. Dunlop* (Apr. 18, 1975), *in* Powell Papers, *supra* note 23.

374. *See* Conference Voting Sheet from the Supreme Court Conference on National League of Cities v. Dunlop (Apr. 18, 1975), *in* Powell Papers, *supra* note 23.

375. *Id.*

We, of course, cannot be sure, but Douglas's dissent in *Wirtz* and his decision to concur in *Fry* strongly suggests he would have voted to invalidate the 1974 amendments in *NLC*. If he did stand by his *Wirtz* dissent, Stewart would have joined him as he did in *Wirtz* and constitutional federalism would have returned to the Supreme Court in a 6–3 decision joined—or perhaps written—by a Roosevelt appointee and leader of the Warren Court.

But Douglas never had the chance to vote, and at the second conference his Republican replacement Stevens voted to uphold the law.[376] Had Justice Stewart kept his earlier pledge not to be the fifth vote to overturn *Wirtz*, the final vote in *NLC* would have been a 5–4 to uphold the law. Replacing a Democratic with a Republican appointee thus nearly stopped the return of constitutional federalism in its tracks. Stewart, however, for unclear reasons, changed his plans, voted with Powell, and for the first time since the New Deal the Court struck down an exercise of Congress's commerce power on federalism grounds, 5–4.

V. *NATIONAL LEAGUE OF CITIES*, THE RETURN OF CONSTITUTIONAL FEDERALISM, AND THE CAUSES OF CONSTITUTIONAL CHANGE

This Article has used an historical examination of *NLC* to challenge existing explanations for the return of constitutional federalism and offer an alternative. That alternative seeks to reveal the interaction between jurisprudential norms and political change rather than reduce legal argument to political preference or vice versa. I also hope it can provide a case study in the processes of constitutional development and cast new light on contemporary debates over constitutional federalism. But before turning to those implications, it may be useful to clarify my causal claim and differentiate it from competing explanations.

I have argued that the best way to explain the return of constitutional federalism begins by recognizing that the structural changes to American government and durable changes in political debate that occurred in the late 1960s and early 1970s undermined broadly shared faith in political safeguards thesis. Those structural changes in government made state governments look more competent and the federal government look less competent. They also emphasized the growing power of national interest groups in contrast to the declining influence of states and localities. The durable changes in American politics included, most importantly, the end of the Southern states' acceptance, and even support, of the lawless violence of white supremacists. When combined with the belief that there was an accelerating shift of real governing authority from the states to the federal government, these changes created widespread doubt that the political safeguards thesis was an accurate description of the American federal system. Because the political safeguards thesis was the principle

376. *Id.*

justification for judicial deference on federalism questions, doubts about its accuracy led some to conclude that the judiciary should protect the autonomy of state governments.

Most important among those who came to doubt the accuracy of the political safeguards thesis was Justice Lewis Powell, who saw his doubts about the political safeguards thesis embodied in the passage of the statute challenged in *NLC*. He thus concluded that the existing tension between the Court's commerce and tax power doctrines was a sufficient justification for invalidating an exercise of Congress's commerce power on federalism grounds for the first time in four decades. Four of his colleagues agreed, joined an opinion that rejected Justice Brennan's paean to the political safeguards thesis, and inaugurated the return of constitutional federalism.

This explanation does not deny that developments beyond the judicial process caused the return of constitutional federalism. In fact, I have argued that such changes were the proximate cause of the decision in *NLC* and the return of federalism to a central place in debates in the courts and the law reviews. Mine is not a formalist or strictly "internalists" explanation.[377] But I also believe this examination indicates that the return of constitutional federalism cannot be explained without considering the specialized language of doctrinal analysis and conceptual structures of constitutional theory that Justices use to justify their decisions. Most importantly, such approaches cannot explain why the return of constitutional federalism originated with Justices Black and Douglas, or why the replacement of a Democratic appointee with a Republican appointee almost prevented the return of constitutional federalism. This is not a fully "externalist" explanation, either.[378]

It is instead an attempt to answer calls for an approach to legal change that integrates internal aspects of the judicial process with external influences.[379] It argues that the decision in *NLC*—and the return of constitutional federalism more broadly—are best explained by considering how developments outside the Court were filtered through the conceptual structures of legal analysis. Justice Powell and the other members of the Court, in other words, did respond to political change. But they did not respond the same way non-judicial political actors would have. They did not evaluate the social and political implications of the case before them, then measure those implications against their political preferences. And they were more than pawns controlled by larger political move-

377. G. Edward White, *Constitutional Change and the New Deal: The Internalist/Externalist Debate*, 110 AM. HIST. REV. 1094, 1095 (2005) (defining "internalists'" and "externalists'" understandings of legal change).

378. *See id.*

379. *See, e.g.*, *id.* at 1115; Paul Frymer, *Law and American Political Development*, 33 LAW & SOC. INQUIRY 779, 793 (2008); Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 607 (2000).

ments like the New Right. Rather, they responded to the changed political environment as judges—as individuals operating in an institutional context and with a personal identity that made the language of doctrinal analysis and constitutional theory important determinants of their decisions. They abandoned a posture of near-complete deference to Congress on federalism issues because they concluded that the established legal justification for that deference was unconvincing in light of the circumstances they saw around them.

This explanation for the return of constitutional federalism has most in common with those offered by Keith Whittington and Edward Purcell, but important differences remain, especially regarding the role of the political safeguards thesis. Purcell has explored the causes of the return of constitutional federalism in broad examinations that span nearly all of the twentieth century.[380] That work recognizes that structural changes in American government played a role in the return of constitutional federalism[381] and identified associations between it and jurisprudential developments, including originalism and economic approaches to legal analysis.[382] He has also explicitly recognized that jurisprudential ideas or doctrinal structures could shape debates over constitutional federalism in some circumstances.[383] His analysis is thus more textured than a simple political explanation. But a central thrust of Purcell's work on the return of constitutional federalism has been to emphasize the challenges of explaining those developments in purely legal terms and the central importance of judges' personal values.[384] That focus, together with the broad scope of his work, have produced explanations for both *NLC* itself and the return of constitutional federalism generally that strongly emphasize the role of political preferences.[385] Debates over the political safeguards thesis are largely a sideshow.[386] Thus, despite the caveats he provided, I think it fair to characterize his approach as inconsistent with the explanation I offer.

My primary difference with Whittington lies in our methods, which, though they are in many ways complementary, nevertheless produce an important disagreement over the role of the political safeguards thesis. Whittington's goal, like mine, is to bridge the gap between internalist

380. *See* PURCELL, *supra* note 14; Purcell, *supra* note 14.

381. *See* PURCELL, *supra* note 14, at 178–79, 179 n.95 (citing Whittington, *supra* note 104).

382. *See id.* at 179–81, 183–84; Purcell, *supra* note 14, at 161.

383. *See* PURCELL, *supra* note 14, at 190.

384. *Id.* at 8–9.

385. *See* Purcell, *supra* note 14, at 161–63. He characterized *National League of Cities* in largely political terms: as an attempt by the Burger Court "to strike directly at the New Deal legacy by reviving the Tenth Amendment." *Id.* at 163. "Although it employed the rhetoric of federalism," he continued, "the Burger Court seemed increasingly committed to a substantively conservative political agenda, especially after the appointment of Justice Sandra Day O'Connor in 1981." *Id.* at 162.

386. *See* PURCELL, *supra* note 14, at 158–59.

and externalist perspectives.[387] We also see similar causes driving the return of constitutional federalism. We both emphasize the importance of durable changes in American politics, society, and jurisprudence,[388] and we identify many of the same changes: declining faith in federal expertise,[389] rising faith in state governments,[390] and changes in racial politics.[391] But the broad scope of Whittington's analysis, which covers decades of changes in multiple doctrinal areas, limits his ability to show how those external changes interacted with the internalist norms of the legal process. Ultimately, his primary evidence that the political, social, and intellectual changes he identified actually caused the return of constitutional federalism is the reasonable "common sense" relationship between them. But without more direct evidence of the very interactions between internal and external whose importance he is trying to show, his work can be interpreted to indicate, as he recognizes, that the developments he identified were important because they changed the political preferences of judges who then simply instituted those preferences.[392] His investigation of the interaction between external and internal factors in federalism doctrine is thus more suggestive than conclusive.

My focus on a single case, on the other hand, has allowed me to try to trace the linkages between external changes and internalist structures. Through a close examination of debates inside and outside of the Court, I have tried to accomplish two things: (1) show that a specific set of changes to American government and politics caused the return of constitutional federalism, and (2) explain why those changes in particular—rather than many other changes in American politics and society that occurred during the same time—were important. My conclusion is that those changes mattered because they undermined the widely shared faith in the political safeguards thesis, which had been the nearly universally accepted justification for judicial deference on federalism issues. The result, I argued, was the return of constitutional federalism. One thus cannot explain the return of constitutional federalism without understanding the role played by the political safeguard thesis. In many ways, that makes my approach and Whittington's complementary. While his work indicates that many of the factors I identify had salience in the 1990s and beyond, my analysis indicates that some of the associations Whittington identified were important causes of the return of constitutional federalism.

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387. *See* Whittington, *supra* note 25, at 484.
388. *Id.* at 485; *see* Whittington, *supra* note 104, at 483–84.
389. *See* Whittington, *supra* note 25, at 498; Whittington, *supra* note 104, at 515–16.
390. Whittington, *supra* note 25, at 499, 502; Whittington, *supra* note 104, at 520–22.
391. *See* Whittington, *supra* note 25, at 494.
392. "It is possible that the Justices have considered such features of modern American life and have developed a policy preference for devolution. They may act directly on that policy preference." Whittington, *supra* note 25, at 500.

But I do differ from Whittington—and others—in identifying the political safeguards thesis as the jurisprudential structure most important to the return of constitutional federalism. The concern of Whittington, as well as Purcell and others, with current federalism doctrines, rather than the return of the debate over constitutional federalism more broadly, led them to see originalism and law and economics as the intellectual developments most important to the return of constitutional federalism. I find, however, little evidence they played an important role in *NLC*. That indicates that while originalism and law and economics have shaped the contours of contemporary federalism doctrines in important ways, they did not play a primary role in bringing the debate over federalism back to the courts and the law reviews. Distinguishing of the causes most important to the return of constitutional federalism from the causes most important to the shape of contemporary federalism doctrines is, as I briefly discuss below, of significant importance to contemporary debates over federalism. It suggests that a form of constitutional federalism quite different from the one we have now—one neither based on law and economics and originalism nor led by Justices associated with conservatism—could have emerged, and still might.

CONCLUSION

This integrative approach I have described seems to me the best way to explain the return of constitutional federalism in *NLC*, but I also hope that this Article can help today's close observers of the federal system understand—and even improve—the contemporary debate over the value of constitutional federalism. There are several ways it might contribute. Certainly, this explanation suggests that there is little reason to expect the debate over constitutional federalism to end anytime soon. Most of the factors that undermined faith in the political safeguards of federalism in the 1960s and 1970s have only accelerated since then.[393] As a result, even a brief perusal of the legal literature confirms what Justice Breyer himself suggested in the oral arguments over the Affordable Care Act: there is widespread but not universal doubt that the political safeguards of federalism provide a sufficient mechanism to limit federal power.[394] This continued doubt may help explain the limits the Court placed on the spending power in *NFIB v. Sebelius*,[395] as well as the in-

393. *See, e.g.*, Kaden, *supra* note 265, at 867; Kramer, *supra* note 12, at 223–27; Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1487 (2001).

394. Transcript of Oral Argument at 75, Dep't of Health and Human Servs. v. Florida, 132 S. Ct. 1618 (2012) (No. 11-398) ("And, of course, the greatest limiting principle of all, which not too many accept, so I'm not going to emphasize that, is the limiting principle derived from the fact that members of Congress are elected from States and that 95 percent of the law of the United States is State law. That is a principle though enforced by the legislature."); *see, e.g.*, Prakash & Yoo, *supra* note 393, at 1461; Kramer, *supra* note 12, at 234; Lee, *supra* note 74, at 333–40.

395. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012); *see* Huberfeld, *supra* note 9, at 46.

creasing interest in the ways federalism can advance interests traditionally associated with the political left.

I also hope this explanation for the return of constitutional federalism can help produce a more robust normative debate over the value of constitutional federalism by undermining the assumption that it will inevitably be a tool to advance conservative values. By arguing that the return of constitutional federalism has been and remains a simple product of conservative politics, the political explanations for the return of constitutional federalism subtly but powerfully suggest that constitutional federalism is inherently conservative. That assumption in turn threatens to impoverish contemporary debates over the proper role of constitutional federalism by discouraging ongoing efforts to identify ways that federalism could advance the interests typically associated with the political left by scholars like Heather Gerken, Robert Schapiro, and others.[396] By focusing on the importance of structural changes and developing jurisprudential norms, I hope this Article can remove the weight of the past from that debate and encourage discussions about constitutional federalism that are further enriched by contributions from scholars concerned with issues typically associated with the left.

Finally, I hope that this integrative approach to understanding doctrinal change provides a case study that can provide some guidance to those seeking constitutional change of any kind. Taken to its extreme, the internalist perspective suggests that constitutional change is generated by improved legal arguments, while the externalist perspective suggests that improved legal argument is irrelevant. Politics, not legal argument, this perspective suggests, is the path to constitutional change. The perspective offered here indicates that both politics and legal argument play a role in generating constitutional change. It thus supports the insights of scholars who have argued that meaningful changes in today's political system are not likely to come from electoral mobilization alone. Instead, with policy increasingly made in institutions like courts and bureaucracies that are governed by particular sets of professional norms and that are relatively insulated from electoral politics, meaningful change in-

396. *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010); Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY 37, 37 (2012); Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33 (2009); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 272 (2005); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 182 (2006). Lawrence Tribe and Frank Michelman began exploring such possibilities in their critique and interpretation of *National League of Cities* itself. Tribe, for example, argued that the decision could be read to support judicial protection of states in order to ensure that those states provide constitutionally required minimum government services. *See* Tribe, *supra* note 24, at 1075–76; Michelman, *supra* note 24, at 1173.

creasingly requires electoral mobilization in conjunction with new ideas, new arguments, and new perspectives.[397]

This Article examines the past, but I hope its most important effects will be on the future. My primary goal is to provide a better explanation for one of the most important developments in modern constitutional law: the return of constitutional federalism. But I do so in hopes of freeing contemporary analysis from understandings of the past that are inaccurate and unhelpful. The past provides few clear answers. But understanding the past more accurately can clear the road to a better future.

397. STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 3 (2008).

ALL THAT HEAVEN WILL ALLOW: A STATISTICAL ANALYSIS OF THE COEXISTENCE OF SAME-SEX MARRIAGE AND GAY MATRIMONIAL BANS

DEIRDRE M. BOWEN[†]

ABSTRACT

This Article offers the first analysis to date of national data evaluating whether defense of marriage acts (mini or super-DOMAs) preserve and stabilize the family. After finding that they do not—just as same-sex marriage does not appear to destabilize families—the Article analyzes what variables are, in fact, associated with family stability. Specifically, those variables are: families below the poverty line; men and women married three or more times; religiosity; percent conservative versus liberal in a state; disposable income; percent with a bachelor's degree; and median age of first marriage. States that are more likely to have enacted a DOMA are also more likely to have high divorce or never-married rates. And in turn, these same states are more likely to include poor families, in which people marry young, are highly religious, and are politically conservative.

Next, the Article applies the sociological concepts of moral entrepreneurism and moral panic, defined, respectively, as the practice of political groups labeling certain behavior as deviant, and the reframing of a social phenomenon in moral terms to create an exaggerated sense of fear. These concepts serve as the theoretical explanation for mini-DOMAs' continued entrenchment, even in the face of the U.S. Supreme Court's *Windsor* decision that struck down Section 3 of the federal DOMA. Finally, the Article offers pragmatic recommendations for achieving family stability in light of mini-DOMAs' inability to succeed in this goal.

† Associate Professor of Law, Seattle University School of Law. Many people deserve thanks for their contributions to this Article: Professor Richard Delgado for his inspiration; Professors Jane Stover and Holning Lau for reading an earlier version of the Article. The Emerging Family Law Scholars for their guidance at the incubator stage; my outstanding research assistants Sarah Albertson, Stacie Naczelnik, Valerie Queseda, Peter Rudolf, and Carl Schremp; and my co-number cruncher, Hayley A.B. Pippin.

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INTRODUCTION

Gareth used to prefer funerals to weddings. He said it was easier to get enthusiastic about a ceremony one had an outside chance of eventually being involved in.

–Four Weddings and a Funeral[1]

The evolving definition of marriage terrifies a lot of people.[2] Yet, for centuries, its meaning has constantly evolved.[3] Broadening the definition of marriage to include same-sex couples is just the latest iteration. Within the past year,[4] the United States Supreme Court struck down Section 3 of the federal Defense of Marriage Act[5] (DOMA), thus allowing legally married same-sex couples to receive all the same benefits as straight couples.[6] Specifically at issue in Section 3 was an overarching federal definition of marriage as a "legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[7]

The case rose on appeal from the Second Circuit, which determined that the statute contained an unconstitutional provision.[8] The Court of Appeals applied an equal protection analysis, defining gays and lesbians

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1. FOUR WEDDINGS AND A FUNERAL (PolyGram Filmed Entertainment 1994).

2. For a recent example, one needs to look no further than the violent response to the passage of a same-sex marriage law in France. Mark Memmott, *Violent Protests in Paris After Same-Sex Marriage Law Passes*, TWO-WAY: BREAKING NEWS FROM NPR (Apr. 24, 2013, 8:04 AM), http://www.npr.org/blogs/thetwo-way/2013/04/24/178765718/violent-protests-in-paris-after-same-sex-marriage-law-passes.

3. *See generally* STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 5–9 (2006) (arguing that love as the motivation for marriage actually weakened the institution).

4. The research for this Article is current as of February 5, 2014.

5. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

6. *Windsor*, 133 S. Ct. at 2683–84, 2696. However, at the time of this analysis, it is unclear which benefits from the over 1000 federal laws DOMA affected are transportable across state lines into states that do not recognize same-sex marriage. President Obama's administration is currently working to clarify these laws. Jeremy W. Peters, *Federal Court Speaks, but Couples Still Face State Legal Patchwork*, N.Y. TIMES, June 27, 2013, at A22.

7. 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

8. On December 7, 2012, the United States Supreme Court granted a petition for a writ of certiorari for the Second Circuit cases combined under *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012). In addition, the Court heard California's Proposition 8 case, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). However, before the Supreme Court decided *Windsor* and *Hollingsworth*, the First Circuit ruled that DOMA was a violation of the Equal Protection Clause. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 10–11, 13, 15 (1st Cir. 2012); *see also* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). Prior to this ruling, other U.S. district courts had ruled on the constitutionality of DOMA. *See, e.g.*, Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 347 (D. Conn. 2012). The trial court in *Windsor* granted the plaintiffs' motion for summary judgment. The trial court declined to hold that the plaintiffs deserved heightened scrutiny as a suspect class, but did hold that DOMA's articulated goals do not pass even the most deferential rational basis review. Windsor v. United States, 833 F. Supp. 2d 394, 401–02, 406 (S.D.N.Y. 2012) (finding a state's interests behind DOMA not based in reality and thus plaintiff's motion for summary judgment was granted), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

as a quasi-suspect class, to determine that the Bipartisan Legal Advisory Group (BLAG) could offer no legitimate reason for DOMA's enactment.[9] The Supreme Court declined to speak to equal protection, but instead applied a federalism and an animus analysis.[10] It concluded that the motivations behind the enactment of DOMA were hostile to a politically unpopular group.[11] Ultimately, the Court held that by injuring same-sex married couples, Section 3 of DOMA violated the Fifth Amendment.[12] Justice Scalia's scathing and colorful dissent proclaimed that such an analysis invites a challenge to all state DOMAs.[13]

Yet, like the supporters of the federal DOMA, supporters of state DOMAs consistently assert that a DOMA is needed to "protect" our society—to strengthen and protect traditional marriage, the cornerstone of civilization.[14] In other words, banning same-sex marriage protects traditional marriage.

Does DOMA *really* protect the institution of marriage? This Article offers an empirical investigation of that question and concludes that DOMAs provide no measurable benefit to the protection of families.[15] This conclusion raises the question whether a state DOMA could even pass a "rational basis plus" standard,[16] much less the animus standard,

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9. *Windsor*, 699 F.3d at 176, 185.

10. *See Windsor*, 133 S. Ct. at 2693. Animus herein refers to a legislative objective, but the "desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)) (internal quotation mark omitted).

11. *See id.*

12. *Id.* at 2696.

13. *See id.* at 2709–10 (Scalia, J., dissenting). The Supreme Court granted certiorari on a case that challenged the constitutionality of California's state DOMA amendment. However, the Court declined to hear the case and remanded it back to the Ninth Circuit for dismissal because the petitioners did not have standing. *Hollingsworth*, 133 S. Ct. at 2659. Mini-DOMA refers to those statutes that states enacted mirroring the federal DOMA statute. Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165–94 (2005).

14. *See, e.g.*, *Bishops' Committee for Defense of Marriage Disappointed over DOMA Ruling*, U.S. CONF. OF CATH. BISHOPS (June 1, 2012), *available at* http://www.usccb.org/news/2012/12-096.cfm (quoting Bishop Cordileone, who declared, "The federal appeals court in Boston did a grave injustice yesterday by striking down that part of the Defense of Marriage Act that reasonably recognizes the reality that marriage is the union of one man and one woman. DOMA is part of our nation's long-established body of law rooted in the true meaning of marriage. Hopefully, this unjust ruling will be overturned by the U.S. Supreme Court, for the benefit of our nation's children, and our nation as a whole." (internal quotation marks omitted)); Karla Dial, *1st Circuit Declares Part of Federal Marriage Law Unconstitutional*, CITIZENLINK (May 31, 2012), http://www.citizenlink.com/2012/05/31/1st-circuit-declares-part-of-federal-marriage-law-unconstitutional/ (quoting Alliance Defense Fund Legal Counsel Dale Schowengerdt, who said, "Society should protect and strengthen marriage, not undermine it. The federal Defense of Marriage Act provides that type of protection, and we trust the U.S. Supreme Court will reverse the 1st Circuit's erroneous decision." (internal quotation marks omitted)).

15. I use the phrases "at-risk families" and "families-in-crisis" interchangeably to refer to the rhetoric employed around the weakening family structure—i.e. family formation without marriage or family cycles that include divorce and perhaps remarriage and perhaps divorce again.

16. "Rational basis plus" loosely refers to a fourth standard of review for laws challenged on equal protection or due process grounds. Rather than offering the traditional deference to the state's argument that that the alleged discrimination in the law serves a governmental interest, the courts

that at least one federal district court has applied.[17] And, if future DOMA challengers adopt "animus" as a legal theory, this Article offers support for the notion that some level of hostility towards gay and lesbian couples may have inspired at least some of the enactors of state DOMAs.

Most importantly, the "DOMA as protectorate" discourse serves certain constituencies' interests quite effectively.[18] The reason why is fully explored in this Article because, in light of the *Windsor* decision, the discourse will remain a vibrant part of the same-sex marriage debate for some time to come.

Next, the Article examines another question: If DOMA is so clearly *not* associated with strengthening family (and marriage)—yet poverty, education, and economic opportunities clearly are—why, then, does DOMA carry the political and legal traction that it does? Understanding this analysis is crucial in the face of the Court's decision and analysis. The federal DOMA is no longer applicable in states permitting same-sex marriage, yet the progeny of the federal DOMA are thriving in thirty-two states.[19] The broadening definition of marriage and the evolution of family will remain in the forefront of our national, legal, political, and cultural consciousness. Thus, understanding how and why state DOMAs can-

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demand a more searching explanation of the government interest. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–35 (1996).

17. Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 334–35 (D. Conn. 2012). In addition, the First Circuit court engaged in a novel analytical approach to determine that a demonstrated connection was missing between DOMA's treatment of same-sex couples and its goal of strengthening the bonds and benefits of marriage. The First Circuit rejected the heightened-scrutiny standard in favor of what it coined a "more careful assessment" than that offered by "conventional rational basis review." Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 11 (1st Cir. 2012). Indeed, only certain types of rationales with a certain level of "force" are acceptable under this "rational basis plus" standard of review. *Id.* at 8. However, applying the "rational basis *plus*" standard of review, the First Circuit decided that DOMA's articulated goal was unacceptable. *Id.* at 15.

18. I posit that those who possess socio-economic political power benefit from focusing attention on DOMA as the key method of saving families in crisis. The discourse distracts from the stark reality that the lack of investment in the resources needed for these families contradicts with the concentration of wealth that the political elite have always enjoyed. Moreover, it distracts from the *divestiture* in social structures that would support not only families subsisting on the margins but also the dissipating lower middle class who used to make up the "settled working class." *See* JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 155–56, 165 (2010).

This Article explores why, in spite of empirical evidence to the contrary, DOMA holds such an attraction to the very families who would most benefit from a radical shift in family policy rather than the empty shell of legislation written in the name of protecting families. *See, e.g.*, Press Release, Office of the Mayor, City of Seattle, *City Formally Joins Effort to Challenge Constitutionality of Federal "Defense of Marriage Act"* (July 10, 2012), *available at* http://mayormcginn.seattle.gov/city-joins-effort-to-challenge-federal-defense-of-marriage-act/ ("More fundamentally, we are joining large and small, public and private entities across the country that recognize that DOMA serves no good purpose—it just forces employers to treat valued employees unfairly, by denying them equality in important family resources such as COBRA, Social Security benefits and pensions." (quoting City Attorney Pete Holmes) (internal quotation marks omitted)).

19. *See generally State-Level Marriage Equality*, MARRIAGE EQUALITY USA (Jan. 6, 2014), http://www.marriageequality.org/sites/default/files/National%20Map%20%2320%20%2806-Jan-2014%29.pdf (providing a map showing states still unwilling to fully accept marriage equality).

not offer a salve to the notion of the family "in crisis" is a focal point of the Article. In addition, the Article offers some novel recommendations for moving beyond the distraction that DOMAs appear to create, to allow for family stability regardless of whether or not states permit same-sex marriage.

When Congress passed DOMA, one of four reasons advanced for DOMA's necessity was to defend and nurture the institution of traditional heterosexual marriage.[20] Indeed, the congressional report stated:

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.[21]

Congress went on to preempt the argument that the institution of marriage was already under attack by divorce when it proclaimed that same-sex marriage was an inherently flawed social experiment.[22] To permit the practice would further devalue an institution already reeling from no-fault divorce, the sexual revolution, and out-of-wedlock births.[23] Ultimately, Congress asserted in this report that the time had come to "rebuild a family culture based on enduring marital relationships."[24]

And certainly, one of the key rationales that BLAG offered in *Windsor* to support DOMA emphasizes this idea of rebuilding the family

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20. H.R. REP. NO. 104-664, at 12 (1996).

21. *Id.* (emphasis added) (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).

22. *Id.* at 15; *see also* David J. Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Basis Approach*, 44 AKRON L. REV. 621, 656 n.244 (2011). "[N]o society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth." *Id.* (alteration in original) (quoting 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Tom Coburn)) (internal quotation marks omitted). "The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society. . . ." *Id.* (omission in original) (quoting 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Bob Barr)) (internal quotation marks omitted). *See generally* Brief for Attorney General, Memorandum of Law in Opposition to Defendants' Motion to Dismiss Complaint and in Support of Commonwealth's Motion for Summary Judgment at 7, Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2010 WL 581804 ("Members of Congress repeatedly condemned homosexuality in the floor debates surrounding DOMA's passage, calling [the practice] 'immoral,' 'based on perversion,' [(quoting 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn))] 'unnatural,' [(quoting 142 CONG. REC. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith))] 'depraved,' and 'an attack upon God's principles.' [(quoting 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer))]").

23. H.R. REP. NO. 104-664, at 15 (1996).

24. *Id.*; *see also* 142 CONG. REC. 22334 (Sept. 9, 1996) (statement of Sen. Jesse Helms) (arguing that DOMA "will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process").

using the institution of traditional marriage.[25] During oral arguments, the topic of whether children are best raised in a stable heterosexual marriage was front and center for Justice Kennedy, the swing vote, and the author of the opinion.[26] And, frustrated with the intractable cultural and philosophical problem, the Court noted that the *Perry v. Schwarzenegger* district court found that "[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."[27] But, what the Court ultimately considered, among other things, is the idea that a diversity of governance requires the federal government to respect states' choices regarding marriage—including the choice to *allow* same-sex marriage.[28]

The Supreme Court has in the last fifty years demanded "closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern."[29] And indeed, the Court's language in the *Windsor* opinion makes quite clear that while it offers considerably broad deference to the states to define marriage as they see fit, each state's motivation behind the definition may not necessarily be beyond constitutional reproach.[30] In signaling so, the Court has fueled the debate about mini-DOMAs' actual ability to preserve family stability and marriage for the foreseeable future.[31]

The Supreme Court DOMA ruling has substantial historical and social significance.[32] As observed above, the federal DOMA's demise offers less immediate relief for those gay and lesbian families who wish to wed, but who reside in states with statutes or constitutional amendments barring same-sex marriage. Many of those states' mini-DOMAs currently remain intact.[33] Given that twenty-nine states have statutes barring

25. *See* Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the United States House of Representatives at 12–15, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

26. *See* Transcript of Oral Argument at 93, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

27. *Windsor*, 133 S. Ct. at 2718 n.7 (citing *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010), finding of fact number 55). *See also* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 14 (1st Cir. 2012) ("DOMA does not . . . explain how denying benefits to same-sex couples will reinforce heterosexual marriage.").

28. *Windsor*, 133 S. Ct. at 2691.

29. *U.S. Dep't of Health & Human Servs.*, 682 F.3d at 16.

30. *Windsor*, 133 S. Ct. at 2692 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

31. Recall, mini-DOMAs are state versions of the federal DOMA. *See supra* note 13.

32. *See* Daniel Fisher, *DOMA Is Dead. So Where Does That Leave Gay Couples?*, FORBES (Mar. 28, 2013, 11:04 AM), http://www.forbes.com/sites/danielfisher/2013/03/28/doma-is-dead-so-where-does-that-leave-gay-couples/.

33. William Saletan, *Gay Bells in Bondage: Most Americans Now Support Gay Marriage. But They Can't Legalize It, Thanks to the Voters of 2004*, SLATE (June 28, 2011, 8:58 AM), http://www.slate.com/articles/news_and_politics/frame_game/2011/06/gay_bells_in_bondage.html. *But see* Anna Staver, *Same-Sex Marriage Amendment in Ohio Gets Green Light*, HUFFINGTON POST (Apr. 3, 2012, 6:44 PM), http://www.huffingtonpost.com/2012/04/03/same-sex-marriage-amendment-ohio_n_1400714.html?ncid=edlinkusaolp00000009 (explaining that Ohio may vote to overturn its 2004 Constitutional Amendment banning same-sex marriage).

same-sex marriage and twenty-nine states have constitutional amendments that prohibit the practice,[34] it is a worthy exercise to explore whether these states have reaped the benefits that they hoped to achieve by enacting mini-DOMAs.[35]

The empirical analysis reveals two conclusions. First, states that enacted a mini-DOMA did so for virtually the same reasons as the federal government. Second, mini-DOMAs do not appear to be achieving their articulated goals. Moreover, it appears that states that possess DOMA statutes or constitutional amendments also espouse greater rates of religiosity, experience larger rates of poverty, divorce, and out-of-wedlock births, in addition to experiencing lower educational rates and marriage rates.[36]

Thus, this Article discusses three issues: first, the methodology and results of the empirical research; second, a theory as to why the articulated mini-DOMA goals of family stability may persist despite the mini-DOMAs' inability to meet those goals; and third, recommendations on how we, as a country of states, can coexist with an evolving definition of marriage and family, while developing and executing an effective policy that supports all of these conceptions of family.[37]

I. METHODOLOGY AND RESULTS

Soon after DOMA went into effect, states began enacting mini-DOMAs,[38] either by statute or state constitutional amendment, and sometimes both.[39] However, not all states adopted their own version of

34. *See infra* note 39. A notable example, Hawaii's Constitution's Second Amendment did not ban same-sex marriage. Rather, it gave the legislature the authority to define marriage as it sees fit. *See* HAW. CONST. art. I, § 23 (amended 1998) (permitting the Hawaii Legislature to authorize same-sex marriage by passing the Hawaii Marriage Equality Act of 2013, S.B. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013)). Hawaii Marriage Equality Act of 2013, § 572-x (2013).

35. The First Circuit opinion did not address Section 2 of DOMA, which frees states that ban same-sex marriage from having to recognize same-sex marriages performed in states that do license homosexual matrimony. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 6 (1st Cir. 2012).

36. This empirical analysis is discussed in detail *infra* Part I.C–D.

37. I do not review the history and background of DOMA, which have been explored in depth elsewhere. *See generally* Julia Halloran McLaughlin, *DOMA and the Constitutional Coming out of Same-Sex Marriage*, 24 WIS. J.L. GENDER & SOC'Y 145, 146–54 (2009); Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263, 286–93 (1997); Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 446–73 (2011).

38. Mini-DOMAs preserve the word "marriage" to one man and one woman, "but not necessarily the attributes of civil marriage," while super-DOMAs restrict terminology and deny all forms of relationship recognition, i.e. civil unions, domestic partnerships, and reciprocal benefits, to same-sex couples. Daniel R. Pinello, *Location, Location, Location: Same-Sex Relationship Rights by State*, LAW TRENDS & NEWS: PRAC. AREA NEWSL. (Am. Bar Ass'n), Fall 2009, *available at* http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/bl_feat5.html.

39. At the time of this analysis, thirty-three states have mini-DOMA legislation through their constitution or statutory law; many states overlap and have both statutory and constitutional mini-DOMAs. *See State-Level Marriage Equality*, *supra* note 19.

At the time of this study, twenty-nine states have constitutional mini-DOMAs. *See* ALA. CONST. art. I, § 36.03 (ratified 2012); ALASKA CONST. art. I, § 25 (approved 1998); ARIZ. CONST. art. XXX, § 1 (approved 2008); ARK. CONST. amend. 83, § 1 (approved 2004); COLO. CONST. art. II, § 31 (added 2006); FLA. CONST. art. I, § 27 (added 2008); GA. CONST. art. I, § 4 (ratified 2004); IDAHO CONST. art. III, § 28 (added and ratified 2006); KAN. CONST. art. XV, § 16 (added 2005); KY. CONST. § 233a (adopted 2004); LA. CONST. art. XII, § 15 (added 2004); MICH. CONST. art. I, § 25 (ratified 2004), *held unconstitutional by* DeBoer v. Snyder, No. 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); MISS. CONST. art. XIV, § 263A (added 2004); MO. CONST. art. I, § 33 (adopted 2004); MONT. CONST. art. XIII, § 7 (approved 2004); NEB. CONST. art. I, § 29 (adopted 2000); NEV. CONST. art. I, § 21 (added 2002) (proposed legislation to amend enrolled (S.J.R. 13, 77th Reg. Sess. (Nev. 2013))); N.C. CONST. art. XIV, § 6 (approved 2012); N.D. CONST. art. XI, § 28 (approved 2004); OHIO CONST. art. XV, § 11 (adopted 2004); OKLA. CONST. art. II, § 35 (adopted 2004); OR. CONST. art. XV, § 5a (added 2004); S.C. CONST. art. XVII, § 15 (effective 2007); S.D. CONST. art. XXI, § 9 (approved 2006); TENN. CONST. art. XI, § 18 (approved 2006); TEX. CONST. art. I, § 32 (adopted 2005), *held unconstitutional by* De Leon v. Perry, No. SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (proposed legislation to repeal introduced (H.J.R. 11, 83rd Leg., 2nd Sess. (Tex. 2013))); UTAH CONST. art. I, § 29 (adopted 2004), *held unconstitutional by* Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013); VA. CONST. art. I, § 15-A (effective 2007), *held unconstitutional by* Bostic v. Rainey, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); WIS. CONST. art. XIII, § 13 (created 2007) (proposed legislation to repeal introduced (S.J.R. 74, 101st Leg., Reg. Sess. (Wis. 2014))). Four of those states currently afford partial marriage rights to same-sex couples: Colorado, Nevada, Oregon, and Wisconsin. *See State-Level Marriage Equality*, *supra* note 19.

At the time of this analysis, twenty-nine states have statutory mini-DOMAs. *See* ALA. CODE § 30-1-19 (2013) (effective 1998); ALASKA STAT. §§ 25.05.011, 25.05.013 (2013) (effective 1996); ARIZ. REV. STAT. ANN. §§ 25-101, 25-112 (2013) (effective 1996) (proposed legislation to amend introduced (S.B. 1165, 51st Leg., 1st Reg. Sess. (Ariz 2013))); ARK. CODE ANN. § 9-11-109 (2013) (effective 1997); COLO. REV. STAT. § 14-2-104 (2013) (amended 2000); FLA. STAT. § 741.212 (2013) (effective 1997); GA. CODE ANN. § 19-3-3.1 (2013) (effective 1996); IDAHO CODE ANN. § 32-201 (2013) (effective 1996); IND. CODE § 31-11-1-1 (2013) (added 1997); KAN. STAT. ANN. § 23-2501 (2013) (effective 2011); KY. REV. STAT. ANN. §§ 402.005, 402.020, 402.040, 402.045 (West 2013) (effective 1998); LA. CIV. CODE ANN. art. 89 (2013) (amended 1999); MICH. COMP. LAWS §§ 551.271, 551.272 (2013) (effective 1996) (proposed legislation to amend introduced (H.B. 4909, 97th Leg., Reg. Sess. (Mich. 2013))); MISS. CODE ANN. § 93-1-1 (2013) (approved 1997); MO. REV. STAT. § 451.022 (2013) (amended 2001); MONT. CODE ANN. § 40-1-401 (2013) (amended 1997); N.C. GEN. STAT. § 51-1.2 (2013) (effective 1996); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2013) (effective 1997); OHIO REV. CODE ANN. § 3101.01(A) (West 2013) (effective 2004); OKLA. STAT. tit. 43, § 3.1 (2013) (effective 1997); 23 PA. CONS. STAT. § 1704 (2013) (effective 1996) (proposed legislation to amend introduced (H.B. 1686, 197th Gen. Assemb. (Pa. 2013-2014))); S.C. CODE ANN. § 20-1-10 (2013) (effective 1996); S.D. CODIFIED LAWS §§ 25-1-1, 25-1-38 (2013) (effective 1996 and 2000, respectively); TENN. CODE ANN. § 36-3-113 (2013) (effective 1996); TEX. FAM. CODE ANN. §§ 2.001, 6.204 (2013) (effective 1997 and 2003, respectively) (proposed legislation to repeal introduced (H.B. 20, 83rd Leg., 2d Sess. (Tex. 2013))); UTAH CODE ANN. §§ 30-1-2, 30-1-4.1 (West 2013) (effective 1999 and 2004, respectively); VA. CODE ANN. §§ 20-45.2, 20-45.3 (2013) (effective 1997 and 2004, respectively); W. VA. CODE § 48-2-603 (2013) (effective 2001); WIS. STAT. §§ 765.001(2), 765.01 (2013) (effective 2009); WYO. STAT. ANN. § 20-1-101 (2013) (effective 1977) (proposed legislation redefining marriage introduced (H.B. 169, 62d Leg., Gen. Sess. (Wyo. 2013))). Despite their statutory mini-DOMAs, Colorado and Wisconsin afford partial marriage rights to same-sex couples. *See State-Level Marriage Equality*, *supra* note 19.

Recently, in *Kitchen v. Herbert*, Utah's constitutional and statutory mini-DOMAs were held unconstitutional. 961 F. Supp. 2d 1181 (D. Utah 2013). However, the United States Supreme Court granted a stay on the recognition of same-sex marriages in the state. *Herbert v. Kitchen*, 134 S. Ct. 893 (mem.) (2014).

In November 2012, mini-DOMAs in Maine, Maryland, and Washington were usurped by popular referenda legalizing same-sex marriage. *See generally A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. TIMES, Dec. 30, 2012, at A20; Ashley Fantz, *Washington Voters Pass Same-Sex Marriage, CNN Projects*, CNN POLITICS (Nov. 9, 2012, 15:21 EST), http://www.cnn.com/2012/11/09/us/washington-passes-same-sex-marriage/index.html; Associated, Press, *Many Weddings as Gay Marriage Becomes Legal in Md.*, USA TODAY (Jan. 1, 2013, 17:41 EST), http://www.usatoday.com/story/news/nation/2013/01/01/same-sex-marriage-maryland/1801917/.

DOMA, i.e. a mini- or super-DOMA,[40] and in the wake of the federal legislation, some states chose to find some parallel version of marriage in the form of civil unions[41] or domestic partnerships instead.[42] Furthermore, a select few states, initially through court action, later by voter referenda, came to permit same-sex marriage or at least recognize same-sex marriages performed in other states even though, at one time, the state may have enacted a mini-DOMA.[43] Thus, differing state reactions

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Prior to November 2012's vote, Maine, Maryland, and Washington had the following statutory DOMAs in place: ME. REV. STAT. tit. 19-A, § 701(5) (1997) (repealed 2012); MD. CODE ANN., FAM. LAW § 2-201 (West 1984) (repealed 2012); WASH. REV. CODE § 26.04.010 (1998) (repealed 2012). *But see* S.B. 241, 430th Gen. Assemb., Reg. Sess. (Md. 2012) (Civil Marriage Protection Act defines marriage as between "two individuals," rather than between "a man and a woman" as previously stated, effective Oct. 1, 2012).

40. For example, Colorado recognizes civil unions between same-sex partners. COLO. REV. STAT. ANN. § 14-15-102 (West 2013). To date, the following states have not enacted mini-DOMA legislation: Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and the District of Colombia.

41. Up through 2013, only two states, New Mexico and Rhode Island, recognized out-of-state same-sex marriages. N.M. STAT. ANN. § 40-1-4 (West 2013); R.I. GEN. LAWS § 15-1-8 (2013).

42. Nevada and Oregon provide the equivalent of state-level spousal rights to same-sex couples in the form of domestic partnerships. NEV. REV. STAT. ANN. §§ 122A.100, 122A.200 (West 2013); OR. REV. STAT. ANN. § 106.305 (West 2013). Washington voters approved same-sex marriage, but the state legislature recognized that marriage may still be impracticable for some couples. http://www.courts.wa.gov/newsinfo/content/pdf/FLHBDomesticPartnershipEdition.pdf. In response, Washington continues to recognize domestic partnerships. WASH. REV. CODE § 26.60.010 (2013) (effective until June 30, 2014) (to be replaced by Referendum Measure No. 74, approved Nov. 6, 2012)). Wisconsin provides *limited* spousal rights to same-sex couples in the form of domestic partnerships. WIS. STAT. ANN. § 770.05 (West 2013); Maureen McCollum, *State Supreme Court to Hear Challenge to Domestic Partnership Law*, WIS. PUB. RADIO (Oct. 21, 2013, 12:05 PM), http://news.wpr.org/post/wi-supreme-court-hear-challenge-domestic-partnership-law (listing some of the limited benefits granted to domestic partnerships including "hospital visitation rights, inheritance access, and family medical leave").

43. At the time of this analysis, the following states and jurisdictions issue marriage licenses (or an equivalent status) to same-sex couples: California, *see* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (holding that the appellants, opponents of same-sex marriage, did not have standing to challenge the ruling that Proposition 8 violated the California Constitution)); Connecticut, *see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that laws restricting civil marriage to heterosexual couples violated same-sex couples' state constitutional equal protection rights); Delaware, Civil Marriage Equality and Religious Freedom Act of 2013, Del. H.B. 75 (2013) (enacted); District of Columbia, D.C. CODE § 46-401 (2010); Hawaii, S.B. 1, 27th Leg., 2d Spec. Sess. (Haw. 2013) (effective Dec. 2, 2013); Illinois, S.B. 10, 98th Gen. Assembly, Reg. Sess. (Ill. 2013) (effective June 14, 2014); Maine, ME. REV. STAT. tit. 19-A, § 701 (2013); Maryland, Civil Marriage Protection Act, H.B. 438, 430th Sess. (Md. 2012); Massachusetts, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ruling that allowing only heterosexual couples to marry is unconstitutional); Minnesota, MINN. STAT. § 517.01 (2013) (effective Aug. 1, 2013); New Hampshire, N.H. REV. STAT. ANN. § 457:1-a (2013) (effective Jan. 1, 2010); New Jersey, Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013); New Mexico, Griego v. Oliver, 316 P.3d 865 (N.M. 2013) (affirming marriage equality in the state, which had never expressly prohibited or allowed same-sex marriage); New York, N.Y. DOM. REL. LAW § 10-a (McKinney 2013) (effective July 24, 2011); Rhode Island, R.I. GEN. LAWS § 15-1-1 (2013) (effective Aug. 1, 2013); Vermont, VT. STAT. ANN. tit. 15, § 8 (2013–14) (amended 2009); Washington, WASH. REV. CODE § 26.04.10 (2013) (approved 2012).

In response to stagnant legislatures, voters began turning to referenda legalizing same-sex marriage. State referenda passed by narrow margins on the November 2012 ballot in Maine (51.5% approve Question 1), Maryland (52.4% approve Question 6), and Washington (53.7% approve Referendum 74). *Marriage and Family on the Ballot*, BALLOTPEDIA, http://ballotpedia.org/wiki/index.php/Marriage_and_family_on_the_ballot (last modified Mar. 25, 2014).

to the conundrum of how to respond to same-sex marriage allows for a statistical analysis of how a state's mini-DOMA legislation may have affected the culture of marriage and divorce in the United States.[44] The analysis is rather simple. Changes in marriage and divorce trends as well as marriage rates and divorce rates are compared before and after an enactment of a mini- or super-DOMA, and changes in marriage and divorce trends and rates are compared between states that enacted DOMAs and those that permit same-sex marriage. But before arriving at that analysis, it is important to identify whether DOMA states employed the same reasoning as Congress did when it enacted the federal DOMA.

A. Context Analysis

The first question that the research addresses is what reasons did states pronounce as the basis for the need to enact a mini-DOMA through statute or constitutional amendment? To answer this query, I analyzed each state's legislative history, statutory language, and media content, looking for themes surrounding the passage of mini-DOMA legislation.[45] I also examined variations based on date of enactment, geographical location, and whether a state passed a statute (a mini-DOMA) followed by a constitutional amendment (a super-DOMA).[46] I then compared the results with the reasons articulated in *Massachusetts v. U.S. Department of*

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44. The theory behind the analysis is that while federal legislation may have some effect on a state's cultural consciousness, a state's decision to enact a mini-DOMA would play a greater role in expressing the cultural values and desires of that state's collective conscience and perhaps influence marital behavior. Likewise, a state's close proximity to other states that have taken action may influence state behavior. Some states respond in kind to a neighboring state, or one in close proximity. For example, Massachusetts's neighboring states—Vermont, New Hampshire, Connecticut, and New York—followed suit in permitting same-sex marriage. Maine initially attempted to follow suit, but a referendum quickly overturned the legislation. *See* An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, L.D. 1020, 124th Me. St. Leg. (2009); Department of the Sec'y of State, State of Me., *November 3, 2009 General Election Tabulations*, ME. BUREAU CORPS., ELECTIONS & COMMISSIONS, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html (last visited Apr. 12, 2014). Three years later, Maine voters approved same-sex marriage by approving Question 1. An Act to Allow Marriage Licenses for Same-Sex Couples and Protect Religious Freedom, ME. REV. STAT. tit. 19-A, § 650 et seq. New Hampshire debated overturning its licensing of same-sex marriage. H.B. 437, 162d Sess. (2011). That bill was voted down 211–116 on March 21, 2012. Michael K. Lavers, *N.H. Lawmakers Reject Marriage Equality Repeal Bill*, EDGE BOSTON, MASSACHUSETTS (Mar. 21, 2012), http://www.edgeboston.com/news/national/news/131180/nh_lawmakers_reject_marriage_equality_repeal_bill.

On the other hand, soon after Washington, D.C., permitted same-sex marriage, Maryland followed suit by recognizing out-of-jurisdiction marriages. Mark Morgan, Editorial, *Maryland's Attorney General Strikes a Blow Against Discrimination with Opinion that Same-Sex Marriages Legal Elsewhere Should Be Recognized*, BALTIMORE SUN, Feb. 25, 2010, at 12A. Two years later, Maryland would allow same-sex marriage with the Civil Marriage Act of 2012, but within months a ballot referendum was certified for November to overturn the legislation. George P. Matysek, Jr., *Leaders Pledge to Overturn Same-Sex Marriage*, CATH. REV. (Feb. 23, 2012), *available at* http://www.catholicreview.org/article/news/local-news/leaders-pledge-to-overturn-same-sex-marriage.

45. *See generally* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (2d ed. 2004); *infra* notes 131–44 and accompanying text.

46. *See* Pinello, *supra* note 38.

Health and Human Services explaining the federal DOMA.[47] Specifically, the court observed that "[T]he Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."[48]

Three key themes emerge from the content analysis regarding motivations for a state's DOMA passage. The first is that the long-held traditions and definition of marriage need protection to thrive.[49] The second is that children need to be protected and/or raised in an optimal environment.[50] The third is that "activist"[51] or "new age"[52] or "liberal"[53] judges

47. 682 F.3d 1, 9–15 (1st Cir. 2012).

48. *Id.* at 14 (alteration in original) (quoting H.R. REP. NO. 104-664, at 12 (1996)).

49. Many proponents fall back on this premise: loosening the definition of marriage will cause the collapse of society. For example, Scott Moody, an economist, believes that "the devaluation of marriage through same-sex marriage will eventually ensure a population in New Hampshire where the shrinking, younger generation will no longer be able to support the state's economy." Amanda Beland, *Foster's Editorial Board: Economist Says Gay Marriage Undermines State's Fiscal Stability*, FOSTER'S DAILY DEMOCRAT, Jan. 18, 2012, *available at* http://www.fosters.com/apps/pbcs.dll/article?AID=/20120118/GJNEWS_01/701189932. But empirical research to date on the effects of same-sex marriage suggests otherwise. *See, e.g.*, M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE 202–06 (2009) (concluding, post-statistical analysis, that not much changes in heterosexual marriage and divorce behavior in societies that recognize same-sex marriage, and in fact, attitudes about the irrelevancy of marriage have little to do with legalization of same-sex marriage). The Williams Institute's research on the economic effects of permitting same-sex unions suggests an economic boon to those states' economies. For example, Iowa added over half a million dollars in additional tax revenue with the legalization of same-sex marriage in 2009. The Williams Inst., *Extending Marriage Rights to Same-Sex Couples in Iowa Boosted the State and Local Economy by $12 Million*, UCLA SCH. L. (Dec. 7, 2011), *available at* http://williamsinstitute.law.ucla.edu/press/press-releases/marriage-rights-same-sex-couples-iowa-boosted-economy/. While some "suggest[] we learn from history, saying every single society who has weakened marriage or even eased divorce all came crumbling down," *Constitutional Amendment Re Marriage: Comm. Minutes on SJR 42 Before the S. Judiciary*, 1997–98 Leg. (Alaska Mar. 9, 1998) (statement of Tom Gordy, Chairman, Christian Coalition) [hereinafter Gordy], *available at* http://www.legis.state.ak.us/basis/get_single_minute.asp?session=20&beg_line=0139&end_line=0752&time=1335&date=19980309&comm=JUD&house=S, the research suggests that economic and social policies are associated with the long term weakening of the family, not the introduction of same-sex marriage. *See, e.g.*, June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 317 (2010) (arguing that research demonstrates family instability can be attributed to lack of economic opportunities, particularly based on social class); Holning Lau, *Would a Constitutional Amendment Protect and Promote Marriage in North Carolina? An Analysis of Data from 2000 to 2009*, 2012 CARDOZO L. REV. DE NOVO 173, 186 (2012) (arguing that marriage amendments appear to have no effect on increasing marriage rates or decreasing divorces rates; conversely, allowing same-sex marriage does not increase divorce rates nor decrease marriage rates).

50. A rich literature addresses this theme. Remarkably, most of the articles used to demonstrate the allegedly damaging effects of same-sex parenting do not contain new empirical data, but rather are summaries of the flaws of articles that suggest same-sex parenting does not harm children. *See generally* MAGGIE GALLAGHER & JOSHUA K. BAKER, INST. FOR MARRIAGE AND PUB. POLICY, DO MOTHERS AND FATHERS MATTER? THE SOCIAL SCIENCE EVIDENCE ON MARRIAGE AND CHILD WELL-BEING, IMAPP POLICY BRIEF (Feb. 27, 2004), *available at* http://www.marriagedebate.com/pdf/MothersFathersMatter.pdf (arguing that while same-sex parentage studies are scant, overwhelming evidence exists that children raised in a "natural" family made up of opposite-sex biological parents fare far better than any other family form); ROBERT LERNER &

ALTHEA K. NAGAI, MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES *DON'T* TELL US ABOUT SAME-SEX PARENTING 3–10 (Jan. 2001), *available at* http://protectmarriage.com/wp-content/uploads/2012/11/nobasis.pdf (finding the research is too flawed to draw meaningful conclusions); MARK MATOUSEK, THE BOY HE LEFT BEHIND: A MAN'S SEARCH FOR HIS LOST FATHER 24–25 (2000) (used as support for the assertion that male children harmed when raised by lesbians); KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN, AND WHAT CAN WE DO ABOUT IT? (June 2002), *available at* http://www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf (summarizing data and concluding two-parent biological households are best); MARY PARKE, CTR. FOR LAW & SOC. POLICY, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING (May 2003), *available at* http://www.clasp.org/admin/site/publications_states/files/0086.pdf; DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 52–78 (1996) (children are harmed when not raised in a household with one father and one mother); GLENN T. STANTON, FOCUS ON THE FAMILY, ARE THE KIDS REALLY ALL RIGHT? WHAT RESEARCH REALLY SAYS ABOUT PARENTS CHILDREN NEED (June 2010), *available at* http://www.focusonthefamily.com/about_us/focus-findings/parenting/are-the-kids-really-all-right.aspx (arguing that studies concluding that same-sex parenting does not harm children are flawed). Diane Sawyer interviewed Rosie O'Donnell, who was crusading to legalize homosexual adoption in Florida in 2002. During the interview, O'Donnell "admitted that her adopted son, Parker, who was being raised by Rosie and her female partner, had expressed a desire for a dad." Alysse ElHage, FAMILY N.C., *Why Gender Matters to Parenting: All Families Are* Not *Created Equal* 3 (quoting the interview *Primetime Thursday: Rosie O'Donnell, In Her Own Words* (ABC News television broadcast Mar. 14, 2002) (observing that many homosexual activists disregard the child's desire for opposite-sex parents, dismissing them as childish whims, societal pressures, or something to get over)), *available at* http://www.ncfamily.org/FNC/1104S1-GenderMatters.pdf (last visited Apr. 12, 2014); Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012) (concluding, among other things, that children who had a parent who engaged in a same-sex relationship at some point in the child's life did not thrive as well as children whose parents did not have such affairs). However, Regnerus's study received a firestorm of criticism. William Saletan, *Back in the Gay: Does a New Study Indict Gay Parenthood or Make a Case for Gay Marriage?*, SLATE (June 11, 2012, 9:08 AM), http://www.slate.com/articles/health_and_science/human_nature/2012/06/new_family_structures_study_is_gay_parenthood_bad_or_is_gay_marriage_good_.html (pointing out the flawed classification system, which ultimately reveals that broken homes, not gay parenting, harm children). The Regnerus study received such a degree of criticism that the author was the subject of an inquiry at the University of Texas. However, the university determined that no investigation was in order. Alan Price, *University of Texas at Austin Completes Inquiry into Allegations of Scientific Misconduct*, U. TEX. AUSTIN (Aug. 29, 2012), http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/.

51. See, for example, Florida. In 2008 voters passed Amendment 2 when proponents were particularly concerned with recent judicial activism in Massachusetts and California usurping the will of the people. *Yes on 2: Fact Sheet*, YES2MARRIAGE.ORG (2008), http://ccpcfl.org/Voter-Guides/2008/2008MarriageAmend2.pdf ("[A]ctivist judges have re-written marriage laws and ignored the will of the people by legalizing same[-]sex marriages."); Jennifer Mooney Piedra, *Florida's Amendment 2 Marriage Vote: Are Domestic Partners at Risk?*, MIAMI HERALD, http://miamiherald.typepad.com/gaysouthflorida/2008/10/floridas-amendm.html (voters worried existing state law would be overturned by a judge). See also Alabama, where voters approved a June 2006 constitutional amendment by 81 % of the vote. Michael Foust, *Ala. Becomes 20th State to Pass Marriage Amendment*, BAPTIST PRESS (June 7, 2006), http://www.bpnews.net/bpnews.asp?ID=23414 ("Judicial activism has put us in the posture of pre-emptive strikes to build a firewall around the state of Alabama." (quoting Michael Ciamarra) (internal quotation marks omitted)).

52. See, for example, Kentucky Representative Sheldon Baugh who sponsored his state's DOMA and said same-sex marriage "flies in the face of what's served mankind for 1,000 years." Jan Garrett, The Debate over Same Sex Marriage: A Discussion of Martha Barnette's Letter (Oct. 2000) (unpublished manuscript) (quoting PARK CITY DAILY NEWS (Mar. 21, 1998)) (internal quotation marks omitted), *available at* http://www.wku.edu/~jan.garrett/ssm.htm. He also noted that "[i]f we change that law, then what's to say we have to have an age limit, or not have multiple partners, or (limit marriage) to human beings." *Id.* (internal quotation marks omitted).

from out of state should not control state laws regarding traditions. Certainly sub-themes emerge under each of these categories, but most remarkable is the consistency of message over the last decade and a half when states began enacting DOMA legislation and passing constitutional amendments.

The central force behind protecting the definition of marriage is the notion that marriage is central to the foundation of society.[54] Because marriage is grounded in biblical origins,[55] redefining it is to fly in the face of religious liberty and morality.[56] The second subtheme revolves around institutional consequences.[57] If marriage is redefined around

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53. *See, e.g.*, Andrew Jacobs, *Georgia Voters to Decide Gay-Marriage Issue in Fall*, N.Y. TIMES, Apr. 1, 2004, at A14 ("We cannot let judges in Boston, or officials in San Francisco, define marriage for the people of Georgia." (statement of Rep. Bill Hembree) (internal quotation marks omitted)); *see also* Lauretta Marigny, Letter to the Editor, *Consider Gay Marriage Ramifications*, BISMARCK TRIB. (July 5, 2004, 7:00 PM), *available at* http://bismarcktribune.com/news/opinion/mailbag/consider-gay-marriage-ramifications/article 0986ab8a-520c-550a-86f7-d8a77f5a72f9.html (explaining that senators are reluctant to support a federal marriage amendment because "one ruling by the U.S. Supreme Court could make same-sex marriages legal in all 50 states").

54. *See* Gordy, *supra* note 49; Jeremy Jay Greenup, Identity as Politics, Politics as Identity: An Anthropological Examination of the Political Discourse on Same-Sex Marriage 39–42 (Jan. 12, 2006) (unpublished M.A. thesis, Georgia State University), *available at* http://digitalarchive.gsu.edu/anthro_theses/10/.

55. *E.g.*, BILL BRADBURY, OR. SEC'Y OF STATE, VOTERS' PAMPHLET: STATE OF OREGON GENERAL ELECTION NOVEMBER 2, 2004, at 80 (2004) [hereinafter OREGON VOTERS' PAMPHLET], *available at* http://oregonvotes.org/doc/history/nov22004/guide/vpvol1.pdf (citing to God's creation of the institution of marriage, "God's purpose," and Biblical citation to *Romans* 1:18–32). However, note that that Jeff Brown, a Georgia State Representative, voted for DOMA because he believed that the historical and biblical definition of marriage is under attack. He argued for a federal constitutional amendment that would better stymie activist judges. Press Release, Jeff Brown, Ga. House of Representatives, Defense of Marriage (Feb. 27, 2004) (on file with author) (admitting he "would be remis[s] if [he] didn't admit that a major erosion of the institution of marriage is due to nearly 50% of heterosexual couples" who divorce).

56. Some evolution has occurred in the use of religious or moral discourse. Initially, the discourse focused on the immorality of homosexuality. However, as that argument appears to lose traction over time as public opinion sways favorably towards same-sex marriage, opponents of same-sex marriage have successfully adopted the religious freedom argument, which has been an effective discourse tool in other arenas. *See, e.g.*, Seth Forman, Op-Ed., *Five Arguments Against Gay Marriage: Society Must Brace for Corrosive Change*, DAILY NEWS (June 23, 2011, 4:00 AM), http://articles.nydailynews.com/2011-06-23/news/29710731_1_gay-marriage-traditional-marriage-gay-advocates (explaining that proponents of the sanctity of traditional marriage must face the risk that they may be seen by future generations in the same light as those who opposed desegregation); *see also* Tovia Smith, *Same-Sex Marriage May Hinge on Supreme Court*, NAT'L PUB. RADIO (Jan. 24, 2012, 4:12 PM), http://www.npr.org/2012/01/24/145473719/same-sex-marriage-may-hinge-on-supreme-court. *See generally* OREGON VOTERS' PAMPHLET, *supra* note 55 (demonstrating that some supporters of Measure 36 argued that Oregon should not be the only place in America that allows gay marriage).

57. *See* Marigny, *supra* note 53 (arguing that same-sex marriage will cause health insurance costs to skyrocket because of new dependents that would be added, which could overburden the system). According to opponents of same-sex marriage, one consequence of same-sex marriage is the societal cost of sending a message that heterosexual parents are irrelevant. "'It's the societal message that same-sex marriage sends—that children do not need a mother and a father,' says Kevin Smith, executive director of New Hampshire's Cornerstone Policy Research." Kathryn Perry, *The Cost of Gay Marriage—In Dollars and Cents*, CHRISTIAN SCI. MONITOR (May 27, 2009), http://www.csmonitor.com/USA/Society/2009/0527/p02s07-ussc.html. *See generally* OREGON VOTERS' PAMPHLET, *supra* note 55 (relaying that many opponents of same-sex marriage argued that it would negatively affect institutions and societal values).

something other than heterogeneous norms, the institution will weaken, creating social instability.[58] In essence, the "family" in its idealized version must be preserved through heterosexual marriage.[59] Implicit in this concern is the fear that, if unchecked, *homosexuality will spread.*[60]

With respect to marriage and children, the most consistent refrain is that marriage creates the optimal environment in which to raise children.[61] Research is sometimes cited that concludes that the outcomes for children are most favorable for offspring raised in a two-parent (opposite-sex, biological) household.[62] Courts and legislatures have adopted this premise and call it a legitimate government interest.[63] However, the sub-contextual inference is that children need protection *from* homosexual parents.[64] Therefore, the concern is not about providing children with an optimal environment per se, but rather that children will be harmed if two people of the same-sex raise them. Again, research is said to demonstrate that children nurtured in same-sex households experience negative consequences compared with children living in married, heterosexual

58. *See, e.g.*, TENN. CODE ANN. § 36-3-113(a) (2013) (effective 1996) ("Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society.").

59. *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (discussing Congress's desire to preserve the notions of traditional heterosexual marriage and family). Gay marriage will likely change the notion of traditional marriage. Forman, *supra* note 56 ("[E]ven gay activists admit they are seeking to change the marriage ideal. . . . It may be old-fashioned to believe women are still necessary to domesticate sexually predatory men. But most social arrangements in which men operate without attachment to women are deeply dysfunctional."). Voter pamphlets contain different flavors of this same point. "For marriage to flourish in our culture, it must be protected from redefinition; for if marriage can mean anything, it will mean nothing." *South Carolina Marriage Amendment*, NO SAME SEX MARRIAGE, http://nosamesexmarriage.com/marriage/SCmarr.php (last visited Apr. 12, 2014). And it takes a mother and a father to raise healthy children. *Id.*; *see also* OREGON VOTERS' PAMPHLET, *supra* note 55, at 79 (needing to protect traditional marriage because marriage is a "building block" of society).

60. Marigny, *supra* note 53 (threatening a significant increase in the percentage of American culture to identify as homosexual).

61. OREGON VOTERS' PAMPHLET, *supra* note 55, at 81 (arguing that the breakdown of marriage hurts children, that same-sex marriage challenges the notion of gender roles within the family, and that changing the importance of gender and the family would be bad). *See also* Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 815–20 (holding that though 'exemplary' gay foster parents formed a 'deeply loving,' and 'interdependent' relationship with their foster children, they held no constitutional right to adoption as a same-sex family structure was not an 'optimal' placement).

62. *See* sources cited *supra* note 50.

63. "[C]ountless statistics and research attest to the fact that when marriage becomes less important because it is expanded beyond its traditional definition to include other arrangements, that untoward consequences such as greater out-of-wedlock births occur." Brief for Intervenor-Appellant at 53, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012) (Nos. 10–2204, 10–2207, 10–2214) (alteration in original) (quoting 150 Cong. Rec. 15074 (2004)) (internal quotation marks omitted) (statement of Sen. Cornyn).

64. The American College of Pediatricians disagrees with the district court's assertion that "a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents." Brief of Amicus Curiae, American College of Pediatricians in Support of Defendants-Appellants at 2, *Massachusetts*, 682 F.3d 1 (Nos. 10-2204, 10-2207, 10-2214) (quoting Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010)) (internal quotation marks omitted).

households.[65] This harming-the-child theme goes further, though. The reasoning goes that children exposed to gay parents may come to think that homosexuality is normal. Second, children may be forced to learn about it in school.[66] Finally, children may experiment with homosexuality and become homosexuals themselves.[67]

A final recurrent strain has to do with fear of activist judges. States started adopting DOMAs in two main waves. The first wave was a response to the Supreme Court of Hawaii's 1993 decision[68] that led to a surge of challenges to the practice of barring same-sex marriage.[69] The second wave came in reaction to, *Goodridge*, the Massachusetts Supreme Court decision in 2003.[70] The states expressed deep concern that judges, not citizens, would define foundational cultural norms surrounding mar-

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65. *See supra* note 50; *see, e.g.*, Forman, *supra* note 56 ("[C]hildren living in gay homes . . . live[] absent a relationship with at least one biological parent."). In fact, much debate arises around this question. The First Circuit chose not to engage in resolving this dispute from a legal standpoint because, as the court observed, same-sex couples are free to create families whether they are married or not. *U.S. Dep't of Health and Human Servs.*, 682 F.3d at 14; *see also* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 340–41 (D. Conn. 2012) (noting that "DOMA bears no rational relationship to the purported goal of ensuring that children are reared by opposite-sex parents" because DOMA cannot prevent same-sex couples from raising children (citing *U.S. Dep't of Health and Human Servs.*, 682 F.3d at 14)).

66. *See, e.g.*, Forman, *supra* note 56 (fearing that courts will impose a duty on schools to teach moral equivalency between homosexual and heterosexual relationships with no obligation to let parents opt out); Marigny, *supra* note 53 ("Textbooks will be required to show families with two mothers or fathers as they now depict the traditional family."). Similarly, proponents of Montana's CI-96 (DOMA Amendment) proclaim, "[W]e could lose the freedom to teach our children as we wish." BOB BROWN, MONT. SEC'Y OF STATE, 2004 VOTER INFORMATION PAMPHLET 23 (2004), *available at* http://sos.mt.gov/elections/archives/2000s/2004/VIP2004.pdf; *see also* Dara Kam, *If Amendment 2 Fails, Backers Say Kids Will Be Led in 'Gay Lifestyle,'* PALM BEACH POST (Oct. 22, 2008), *available at* http://pridetb.homestead.com/10IfAmendment2FailsBackersSayKidsWillBeLedInGayLifestyle10-22-08PBPost.htm ("Failing to ban gay marriage in the state constitution could result in the indoctrination of schoolchildren into a gay lifestyle."); *LA Schools to Teach LGBT Curriculum in Anti-Bullying Effort*, CBS L.A. (Sept. 14, 2011, 10:56 PM), http://losangeles.cbslocal.com/2011/09/14/la-schools-to-teach-lgbt-curriculum-in-anti-bullying-effort/ ("Students in the Los Angeles Unified school district may soon be taught 'age-appropriate' curriculum promoting positive images of homosexuals and their contributions to society.").

67. *E.g.*, Marigny, *supra* note 53 ("If we stamp the lifestyle with approval by sanctioning same-sex marriage, many more young people will be experimenting with homosexuality and end up as part of that subculture.").

68. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

69. *E.g.*, Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d at 6 & nn.1–2.

70. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the state may not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry"). Many states responded to the Massachusetts decision by enacting mini-DOMA constitutional amendments in 2004, including Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *State Policies on Same-Sex Marriage*, PEW RES. CENTER (July 9, 2009), http://www.pewforum.org/2009/07/09/state-policies-on-same-sex-marriage/. Likewise, in 2005, Kansas and Texas followed suit with their own amendments. *Id.* In 2006, Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin enacted amendments. *Id.* Arizona, California, and Florida passed amendments in 2008. *Id.* In May 2012, North Carolina approved its own constitutional amendment banning gay marriage. Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

riage.[71] Judges could easily rely on little understood, seemingly esoteric legal principles to destroy a centuries-old foundational institution that goes to the root of civilization.

These concerns varied in intensity depending on geographical location. For example, some citizens in Southern states may be more likely to express the desired goals using language that, at times, comes across as homophobic.[72] Moreover, this same geographical area includes some individuals who may rely on the discourse of "God's law" as the overriding principle for defining marriage.[73] Finally, a fascinating articulation of the need for marriage occurred in North Carolina,[74] (but the same may also hold true for South Carolina)[75] where heterosexual marriage func-

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71. *See supra* notes 51–53 (discussing judges as "activists," "new age," and "liberal"); Brian Tashman, *Conservatives Decry 'Bizarre' Ruling Finding DOMA Unconstitutional, Lament 'East Coast Liberal Freak Show,'* RIGHT WING WATCH (May 31, 2012, 4:11 PM), http://www.rightwingwatch.org/content/conservatives-decry-bizarre-ruling-doma-unconstitutional. For example, proponents of Michigan Proposal 04-2 to ban same-sex marriage "believe that amending the [state] Constitution is necessary to avert a judicial interpretation of law allowing same-sex marriage, as occurred last year in Massachusetts." PATRICK AFFHOLTER, SENATE FISCAL AGENCY, NOVEMBER 2004 BALLOT PROPOSAL 04-2, at 3 (2004), *available at* http://www.senate.michigan.gov/sfa/publications%5Cballotprops%5Cproposal04-2.pdf. Furthermore, in 2010, Iowa voters removed three Iowa Supreme Court Justices who voted to allow same-sex marriage in the state. Peter Hardin, *In Iowa, Threats to Impeach Judges Are Renewed*, GAVEL GRAB (June 14, 2012), http://www.gavelgrab.org/?p=37494.

72. Two principal traditionalist arguments against same-sex marriage are the polygamy slippery-slope and the contagious-promiscuity arguments. The first is epitomized by Texas Rep. Warren Chisum. He said, "It's important not to enter into a social experiment that would change the definition of family. There's a short step from homosexual marriage to polygamy." Sandra Zaragoza, *Business Wary over Prop 2*, DALLAS BUS. J. (Oct. 23, 2005, 23:00 CDT) (internal quotation marks omitted), http://www.bizjournals.com/dallas/stories/2005/10/24/story1.html?page=all. The second suggests that gay men are more promiscuous than lesbians and straight individuals. Gay male couples will, therefore, be more promiscuous than other couples. As a result, the non-monogamous behavior of gay male couples will, by notorious example, weaken the monogamous commitment of married heterosexual couples, which will eventually destabilize traditional marriage. Dale Carpenter, *The Traditionalist Case–The Contagious-Promiscuity Argument*, VOLOKH CONSPIRACY (Nov. 2, 2005, 4:43 PM), http://www.volokh.com/archives/archive_2005_10_30-2005_11_05.shtml#1130971386; *see also* MISS. CODE ANN. § 93-1-1(2) (2013) (effective 1997) (Mississippi codified marriage between persons of the same gender as void under a section titled "Incestuous Marriages Void"). *Cf.* WASH. REV. CODE § 26.04.010 (1998) (titling the section "Marriage Contract – Void Marriages").

73. *See* Press Release, *supra* note 55. Similarly, Harold Auxier, a Kentucky voter, said, "It's God's law that woman was made for man and man for woman—not man for man and woman for woman." *Kentucky Voters Approve Same-Sex Marriage Ban Amendment*, USA TODAY (Nov. 3, 2004, 2:26 AM), http://www.usatoday.com/news/politicselections/vote2004/2004-11-02-ky-initiative-gay-marriage_x.htm.

74. Alliance Defense Fund claims that a DOMA amendment in North Carolina will help encourage a decline in domestic violence in the state. Brian Tashman, *ADF: 'North Carolina Marriage Amendment Will Help Promote' the Decline of Domestic Violence*, RIGHT WING WATCH (May 8, 2012, 12:15 PM), http://www.rightwingwatch.org/content/adf-north-carolina-amendment-one-domestic-violence.

75. In fact, it turns out South Carolina's women may be in need of protection too. In the past ten years, South Carolina has ranked in the top ten states for the highest rate of women murdered by men. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2011 HOMICIDE DATA 5, 18 (2013) [hereinafter 2011 HOMICIDE DATA], *available at* http://www.vpc.org/studies/wmmw2013.pdf. In 2009, South Carolina ranked 7th in the United States for female homicides by male offenders with 90% of the women murdered by someone they knew. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2009 HOMICIDE DATA 22

tions as a way to contain male aggression and sexuality. Thus, not only children, but also women find protection through marriage.

The cultural framing around the need for DOMAs is significant in the urgency expressed regarding the integrity of the family and the role homosexuality appears to play in threatening the ideal notion of the family. Part II of this Article discusses this point in more detail. Regardless of how the states express their DOMA goals, these goals mirror the goals stated in *Massachusetts*[76] and in the petitioner's brief in *Windsor*.[77] Thus, the assertion that passage of these statutes and amendments is associated with the articulated, desired goals demands interrogation.

B. Analysis of State DOMAs

This next section considers whether states' passage of a DOMA statute, a constitutional amendment, or both, correlated with the goal of strengthening marriage compared with states that did not enact such legislation.[78] In other words, did DOMAs increase marriage and decrease divorce over time in states that enacted the legislation compared with states that shunned DOMAs?[79]

To examine this correlation, I operationalized the goal of family stability/marital strength by measuring the year-over-year marriage and divorce rates from 1999 through 2010.[80] The slope, or average rate of change, is calculated for the years prior to adoption of a state's DOMA

(2011), http://www.vpc.org/studies/wmmw2011.pdf. In 2010, South Carolina ranked 2nd for homicides committed against females. VIOLENCE POLICY CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2010 HOMICIDE DATA 6, 17 (2012), http://www.vpc.org/studies/wmmw2012.pdf. In 2011, South Carolina ranked first in the nation. 2011 HOMICIDE DATA, *supra*, at 15. Indeed, "South Carolina Attorney General Alan Wilson identified domestic violence as the number one crime issue in the state. According to the State Attorney General's website, more than 36,000 victims report a domestic violence incident to law enforcement statewide." Anomaly, *Domestic Violence Is the Number One Crime Issue in S.C., Nikki Haley Vetoes Funding, Calls It a "Distraction,"* FREAKOUTNATION (July 10, 2012), *available at* http://freakoutnation.com/2012/07/10/domestic-violence-is-the-number-one-crime-issue-in-s-c-nikki-haley-vetoes-funding-calls-it-a-distraction/.

76. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 14–15 (1st Cir. 2012).

77. Petition for Writ of Certiorari Before Judgment, Windsor v. United States, No. 12-63, 2012 WL 2904038 (July 16, 2012).

78. One study examined the negative externalities, or effect, on the institution of heterosexual marriage in states that allowed same-sex marriage with the effects on those states that did not, finding no statistically significant difference in outcomes. Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 292, 293 (2009). However, this study has been criticized because of operationalization errors, coding errors, and statistical power errors. Douglas W. Allen, Let's Slow Down: Comments on Same-Sex Marriage and Negative Externalities (Dec. 9, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1722764.

79. This analysis is based on the state of the law at the time for which the data was collected: 1999–2010.

80. These years are used because they represent the decade in which the vast majority of DOMA amendments passed. The end year, 2010, is the most recent year for which data is available. The start year, 1999, is the first year for which continuous year-over-year data is available.

amendment and the years after the passage of the DOMA amendment for both marriage and divorce.[81]

The key independent variable in the study was whether a state had amended its constitution to define marriage as between a man and a woman, i.e., to ban same-sex marriage.[82] States that had enacted both a statute banning same-sex marriage and a constitutional amendment to the same effect or states that had passed a constitutional amendment, but did not enact a statute[83] during the time for which marriage and divorce rates were available were included in this category and coded as "0."[84] Under the rationale behind DOMA, the institution of marriage would be least vulnerable in these states because its citizenry has clarified the definition of marriage in its constitution—clearly expressing the state's values regarding this bedrock social structure.[85]

On the other hand, states that did not have a constitutional amendment at the time that I collected the data, but rather had enacted a statute banning same-sex marriage during the period in question[86] were included as a separate category coded as "1."[87] These states' marital vulnerability might be considered slightly higher under the DOMA rationale because these statutes were open to constitutional challenges. Thus, the citizenry

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81. "Slope" is the statistical term that refers to the average rate of change for the period of years measured and analyzed. It is the central measurement of a trend model. LINDA L. REMY ET AL., UCSF FAMILY HEALTH OUTCOMES PROJECT, DO WE HAVE A LINEAR TREND? A BEGINNER'S APPROACH TO ANALYSIS OF TRENDS IN COMMUNITY HEALTH INDICATORS 3 (2005), *available at* http://familymedicine.medschool.ucsf.edu/fhop/docs/pdf/mcah/trend13b.pdf.

82. Recall that a state constitutional amendment defining marriage in this way is termed a "super-DOMA." *See supra* note 38 and text accompanying note 46.

83. Four states—California, Nebraska, Nevada, and Oregon—responded to either the Hawaii Supreme Court decision or the Massachusetts Supreme Court decision by directly amending their constitutions. *See supra* note 39.

84. For example, California passed its amendment in 2008. CAL. CONST. art. I, § 7.5 (2008). However, a federal district court ruled that it was unconstitutional in 2010. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Thus, for purposes of this analysis, California is treated as having a super-DOMA. The challenge in categorizing states with evolving legislation or legal precedent is determining how long the state held a particular status such that the citizenry would have time to experience a cultural shift in light of the legal changes to marriage definitions.

85. Recall that marriage was open to attack if procreation was perceived as acceptable outside of marriage or open to interpretation by judges. *See supra* notes 51–53 and 70.

86. Two states fall into this category: Washington and Maryland. The Washington State Legislature overturned its 1998 statute banning gay marriage by enacting a statute permitting same-sex marriage in early February 2012. WASH. REV. CODE § 26.04.010 (2013); S.B. 6239, 62d Leg., 2012 Reg. Sess. (Wash. 2012), *available at* http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/6239.pdf. The law was to take effect June 7th, 2012, but the decision was stayed by Referendum 74 on the November 6, 2012, ballot. *Proposed Referendum Measures–2012*, WASH. SECRETARY ST., http://www.sos.wa.gov/elections/initiatives/referendum.aspx?y=2012 (last visited Apr. 13, 2014). Therefore, Washington State is included in the statutory-ban group for purposes of this analysis. Maryland is similarly situated for this analysis. *See* H.B. 438, 2012 Leg., 430th Sess. (Md. 2012); *2012 General Election Ballot Questions*, MD. ST. BOARD ELECTIONS, Question 6, http://www.elections.state.md.us/elections/2012/ballot_questions.html (last visited Apr. 13, 2014). For information on the state of the law in these jurisdictions as of February 5, 2014, see *supra* note 39.

87. Recall that a statute banning same-sex marriage is referred to as a mini-DOMA. *See supra* note 38 and the text accompanying note 46.

may not have had rock-solid confidence around the meaning of marriage as an institution in these states because "activist" judges could have overturned the statutory definition, resulting in a more fluid definition of marriage.[88]

Finally, those states that had no statute or amendment banning same-sex marriage were coded as "2." This coding structure allowed me to hypothesize that the institution of marriage, according to the DOMA rationale, would be weakest and most vulnerable to attack in these states. The citizenry either had not collectively expressed a codified position regarding the definition of marriage, or it had determined that a broader definition of marriage, which includes same-sex couples, is appropriate—again at the time that I collected the data.

The analysis incorporated a number of control variables. Variables known to affect marital stability are: median age of first marriage, percent of state's population with a bachelor's degree, median disposable income, and percent of population living below the poverty line.[89] Four other variables were included in the analysis because they are likely to influence a state's view of marriage or to reflect the current state of marital stability there: percent of males and percent of females married three or more times; percent of population who view religion as an important part of daily life; percent of single-parent households; and the conservative-advantage points[90] over liberals in the state.[91] Finally, the variable of state recognition of alternative legal relationships (i.e. domestic partnerships) was added to the analysis.[92] Other variables initially included in the analysis were foreclosure rates and unemployment rates. However, in this study, these variables appeared to have no effect on the marriage and divorce trends.[93]

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88. *See supra* note 51.

89. *See generally* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).

90. "Conservative-advantage points" refers to the number of conservative voters greater than the number of liberal voters in a state. For example, if a state had 45% conservative voters and 30% liberal voters, the conservative advantage would be 15 points.

91. Data for these variables were obtained from the U.S. Census Bureau, with exception of religiosity and conservative-advantage points, which came from Gallup polls. *American Community Survey*, U.S. CENSUS BUREAU http://www.census.gov/acs/www/data_documentation/data_main/ (last visited May 21, 2014); Frank Newport, *State of the States: Importance of Religion*, GALLUP (Jan. 28, 2009), http://www.gallup.com/poll/114022/state-states-importance-religion.aspx#1 (religiosity); *State of the States*, GALLUP, http://www.gallup.com/poll/125066/State-States.aspx?ref=interactive (last visited Apr. 13, 2014) (interactive map, select "Conservative advantage" metric).

92. The state of the law involving same-sex marriage is constantly evolving. Thus, the data relied on the state of the law between 1999–2010. Much has changed since then. For example, some states, like Washington, did not permit same-sex marriage at the time of this analysis, but provided rights very similar to marital rights through domestic partnerships. *E.g.*, WASH. REV. CODE § 35.21.980 (2009). *See generally supra* note 42 (enumerating states offering comparable rights). Other states allow for similar rights by providing for civil unions. *Supra* note 40.

93. These results are consistent with the other analysis addressing the statistical link between economy and divorce. Philip N. Cohen, *Recession and Divorce in the United States, 2008–2011*

1. Results

The first hypothesis is that those states that have both constitutional amendments and statutes, or just constitutional amendments, would be associated with the greatest decline in divorce rates.[94] Following this logic, by comparison, those states that had just a DOMA statute might not experience as radical a decline in their divorce rates. Finally, those states without a DOMA statute or amendment would have likely had the lowest decline in divorce.[95] The same hypothesis applies for patterns of marriage but in the converse. In DOMA-amendment or amendment-plus-statute states, one might expect to see the greatest increases in marriage rates, followed by lesser increases in DOMA-statute or no-DOMA states.

(Md. Population Research Ctr., Working Paper No. 008, 2014), *available at* http://papers.ccpr.ucla.edu/papers/PWP-MPRC-2012-008/PWP-MPRC-2012-008.pdf (concluding that unemployment rates had no effect on the odds of divorce, and while foreclosure rates were positively associated with divorce, the correlation was not statistically significant); *see also* Jeff Grabmeier, *Marital Separations an Alternative to Divorce for Poor Couples*, OHIO ST. U. RES. NEWS (Aug. 13, 2012), http://researchnews.osu.edu/archive/maritalsep.htm (concluding that other factors—such as a racial or ethnic minority status, family income, family education, and the presence of young children—are predictive of long-term separation). But, the public discussion emerging from media suggests that the economy *is* a substantial cause for declines in divorce rates. Lisa Belkin, *Postponing Divorce in a Down Market*, N.Y. TIMES MOTHERLODE (Mar. 23, 2010, 10:47 AM), http://parenting.blogs.nytimes.com/2010/03/23/postponing-divorce-in-a-down-market (discussing the affordability of divorce and how hardships imposed by excessive debt may postpone separation); Carol Mithers, *What to Do When You Can't Afford a Divorce*, O, OPRAH MAG. (May 2009), *available at* http://www.oprah.com/relationships/What-to-Do-When-You-Cant-Afford-a-Divorce.

94. States with both constitutional amendments and statutes banning same-sex marriage at the time of this study were Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia. States with a constitutional amendment banning same-sex marriage at the time of this study, but having no matching statute, were Oregon and Wisconsin. *See, e.g.*, OR. REV. STAT. § 106.010 (enacted 1975) (defining marriage as "a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age"). *But see* OR. REV. STAT. § 106.020 (enacted 1989) (prohibiting certain marriages but not expressly prohibiting same-sex marriages). States with statutes banning same-sex marriage at the time of this study, but with no constitutional provisions, were Delaware, Illinois, Indiana, Maine, Minnesota, Pennsylvania, West Virginia, Wyoming, Maryland, and Washington. The Maryland and Washington legislatures passed bills in February 2012 permitting same-sex marriage, but the legislation was stayed pending referendums in November in both states. *See supra* note 86. States that did not ban same-sex marriage by either statute or constitutional amendment at the time of this study were New York, Rhode Island, Vermont, Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, and New Mexico. New Jersey's governor, Governor Christie, vetoed the February 2012 same-sex marriage bill, and the matter was stayed pending a public referendum on the November 2012 ballot. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19. New Mexico law made no mention of same-sex marriage at the time of this study. *New Mexico*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/entry/c/new-mexico (last visited June 12, 2014) ("New Mexico's laws do not explicitly allow or prohibit marriage for same-sex couples."). In 2007, 2008, and 2010, New Mexico state legislators introduced bills to allow same-sex marriage. *Id.* Each was either defeated or died. *Id.* Alternatively, in 2008, a bill was introduced to prohibit same-sex marriage, but it failed as well. The District of Columbia also did not have laws banning same-sex marriage at the time of this study. See note 39 for the state of the law as of February 5, 2014.

95. To create a meaningful "before" and "after" comparison to the states that enacted constitutional amendments, states with or without a statute had their marriage and divorce trends grouped between 1999–2004 and 2005–2010.

To engage in this analysis, I conducted four separate statistical examinations. The first series looked at a comparison in the trends of marriage before and after DOMA enactment for the group of states that passed a DOMA amendment compared with those that did not.[96] The next analysis explored the average marriage rates in the years before and after DOMA passage for both groups of states.[97] The third examination of data explored any statistically significant differences that may have emerged in the divorce trends for either group of states. An exploration of any statistically significant differences in the average divorce rates in the years prior to and after DOMA ratification between the DOMA and non-DOMA states concluded the analysis. At this point in the Article, it is important to note that during the years captured for the analysis, regardless of the state, both marriage and divorce rates were on the decline everywhere.[98] The question becomes: by how much?

To begin, I calculated the slopes for each state.[99] Next, I conducted a paired-samples-means-t-test analysis[100] using the Statistical Package for the Social Sciences (SPSS). This analysis revealed whether a statistically significant difference for the average decline in marriage and divorce trends marked the two time periods. The first period captures the years before the enactment of the amendments for both the DOMA and non-DOMA states,[101] and the second period captures the years after the passage of DOMA amendments regardless of whether the states enacted an amendment. The results showed that, for either category of state, the

96. Trend analysis provides the most accurate measure of *change* in marriage or divorce in a particular state or group of states. However, it does not reveal the number of people in the state that engage in the behavior.

97. Rates provide standardized measurements of divorce or marriage in a particular state or group of states based on a population unit over a given period of time. Rates measure how much of a state's population engages in the particular behavior.

98. *National Vital Statistics System: National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited June 12, 2014).

99. Alaska and Nebraska are excluded from both the marriage and divorce analysis because they enacted amendments in 1998 and 2000, respectively. ALASKA CONST. art. I, § 25 (approved 1998); NEB. CONST. art. I, § 29 (adopted 2000). Thus, the data available do not allow for meaningful review of trends in those states. Further, Oklahoma does not have marriage and divorce data available prior to 2004, so it is not included in the marriage trends. Likewise, California has no divorce data available; Georgia has no divorce data after 2003; Hawaii only provided divorce data through 2002; Indiana has no divorce data; Louisiana has virtually no divorce data available; and Minnesota has no divorce data after 2004. Therefore, these states are excluded or partially excluded from the analysis. Each state's slope was analyzed for linearity. The following states revealed curvilinear trends: Washington D.C., Massachusetts, and Montana. By curvilinear, we mean that the trends do not follow a straight path consistently increasing or decreasing over time. Instead, the data shows trends that are more circular in which the rates increase and decrease unevenly.

100. A paired-sample t-test is used in "before-after" studies, comparing the population means of two correlated samples to determine whether a significant difference exists between the average values of the same measurement taken under two varying conditions. *See, e.g.*, FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES 353–56 (8th ed. 2009).

101. Recall that the non-DOMA states' marriage and divorce trends are divided similarly to the time trends in the DOMA states in order for the former states to act as a control—or as a comparison group—with the DOMA states. *See supra* note 95.

marriage rate consistently declined throughout the pre- and post-amendment time periods. Moreover, the average difference in decline before and after an amendment passage was not statistically significant.[102]

Another way of considering this outcome is to look at the average rate of marriage for the time before and after the amendments' passage.[103] The mean rate of marriage gives a sense of how many people were likely to marry in a particular type of state—either a DOMA or non-DOMA state for our purposes. Prior to the passage of DOMA amendments, the average marriage rate in DOMA states was 7.83 per 1000 people.[104] In non-DOMA states, the rate was 8.67 per 1000 people. Even though the rate of marriage declined for both groups after a DOMA amendment enactment, the average marriage rate remained lower in DOMA states than in non-DOMA states. In DOMA states, the marriage rate was 6.96 per 1000 people compared to 7.93 per 1000 people in non-DOMA states. These different average rates, though quite small, were statistically significant for both pre- and post-DOMA ratification.

Thus, two important points emerge. First, the data analysis reveals that non-DOMA states included a population of individuals who, on average, are slightly more likely to marry than their counterparts in DOMA states. Second, the trend of declining marriage was present in both categories of states, but it was not statistically significant from the trend prior

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102. Statistical significance is an assessment indicating the likelihood that the results obtained reflect a pattern or occurred due to chance. *See, e.g.*, JEREMY MILES & PHILIP BANYARD, UNDERSTANDING AND USING STATISTICS IN PSYCHOLOGY: A PRACTICAL INTRODUCTION 86–88 (2007). Statistical significance most likely did not emerge for the pre- and post-DOMA enactment for either of these groups of states because the trend was consistently downward for the ten-year period measured. No major historical events occurred that have had measurable effects on the states as groups. Although one would have expected that the Great Recession would have affected marriage and divorce trends, it does not appear to have done so. *See* Cohen, *supra* note 93. However, an individualized analysis of each state reveals that certain states, with the passage of laws that permit same-sex marriage, experience a sharp uptick in their marriage rates. However, this new marriage rate does not sustain itself. The question of whether this uptick affects divorce rates remains an open question. A five-year delay between marriage and divorce trends is expected given the mean number of years (five) that must pass before a marriage is likely to end in divorce. Steve Doughty, *The Five-Year Itch: Crisis Point for the Modern Marriage Is Arriving Sooner*, DAILY MAIL (U.K.), Oct. 29, 2007, at 25 (discussing a study by the Max Planck Institute). Massachusetts is the one state that does provide enough data for a preliminary examination. Indeed, the results show that after a consistent (and low) divorce rate in the time period between 2004 and 2009, a sharp increase in the divorce rate began in 2010—five years after the steep hike in marriage rates. *See* Appendix A.

103. The average rate does not measure the change or trend year over year, but rather defines the average number of people per one thousand people in the population who married in the state during a particular time period.

104. Nevada is excluded from the mean marriage-rate analysis because it is a significant outlier that disproportionately increases the marriage rate for DOMA states. Please note that the data presented in the charts is for the different permutations of DOMA options. However, the data discussed in the text combines the DOMA statute-only states with non-DOMA states in order to isolate the states with constitutional amendments and compare them to states that did not respond so definitively to banning same-sex marriage. The idea was also to create sample sizes that might create enough statistical power to find statistical significance.

to the passage of DOMA amendments.[105] In other words, people in the United States, generally, were increasingly less likely to get married during the time that the analysis was conducted regardless of whether a given state had a DOMA amendment.[106]

TABLE ONE

MARRIAGE RATES AND TRENDS FOR DOMA AND NON-DOMA STATES

	Rate/1000 in the pop		Avg. Decline		
	Pre	Post	Pre	Post	n
DOMA amendment and statute	8.50	7.59	-0.358	-0.256	26
DOMA statute only	13.13	10.58	-0.053	-0.223	12
No DOMA	7.01	6.46	-0.076	-0.134	7

On the other hand, the divorce-rate trend also declined for both groups, but the average rate of decline in the time period before DOMA versus the time period after DOMA is statistically significant for both groups. In other words, both groups experienced a lesser decline in divorce rates in the years *after* the political discourse and enactments of DOMA amendments. Thus, regardless of whether or not a state enacted an amendment or a statute barring same-sex marriage, fewer of its citizens chose to divorce. However, the reduced decline can most likely be attributed to fewer marriages occurring during this same time period.[107]

Adding context to this trend data, the mean divorce rates for the DOMA and non-DOMA states reveal that the mean rate of divorce was slightly lower after the passage of DOMA for both groups. However, these differences are not statistically significant from the average rates of divorce for either group prior to DOMAs' passages. Nonetheless, on average, citizens of non-DOMA states tend to get divorced less than individuals living in states that have DOMA amendments. Specifically, prior to DOMA's passage, the average rate of divorce in DOMA states was 4.1 compared to 3.72 in non-DOMA states. After the enactment of

105. These points are important in exploring why DOMA could not solve the perceived issue of declining marriage rates. The next section offers an explanation of why DOMA is irrelevant to shoring up the institution of marriage, particularly for those states that do possess legislation barring same-sex marriage. *See infra* Part II.

106. Data on national divorce rates is still only available through 2010. *Marriage and Divorce*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nchs/fastats/divorce.htm (last updated Nov. 21, 2013).

107. Note the lower mean rate of marriage during this period. *See supra* Table 1.

DOMA amendments, the average divorce rate dropped to 3.78 in DOMA states and 3.34 in non-DOMA states. Thus, one can conclude that, while less divorce occurs in non-DOMA states, both types of states experienced a statistically significant rate of change in divorce after the passage of DOMA regardless of whether the state has the amendment. Simply put, the decline in divorce slowed in the years after DOMA for both types of states, and an incredibly small difference in divorce rates existed between the two types of states.

TABLE TWO

DIVORCE RATES AND TRENDS FOR DOMA AND NON-DOMA STATES

	Rate/1000 pop.		Avg. Decline		
	Pre	Post	Pre	Post	N
DOMA amendment and statute	4.08	3.82	-0.125	-0.001*	24
DOMA statute only	3.92	3.49	-0.096	-0.004*	12
No DOMA	3.99	3.62	-0.036	-0.041*	6

*Statistically significant at p=0.05

The more compelling question, though, was whether the mean difference in the *trend* of decline for divorce and marriage in the two time periods, pre- and post-DOMA amendment passage, was statistically different *between* the two groups of states: those that enacted an amendment or statute, and those that did not. The next analysis sought to identify whether states that passed DOMAs experienced greater marriage rates and reduced divorce rates compared to those states that remained DOMA-free.

Again, using SPSS, I conducted an independent-sample-mean-t-test to determine whether statistically significant differences marked DOMA and non-DOMA states for pre- and post-DOMA marriage trends and pre- and post-DOMA divorce trends.[108] Recall, the hypothesis was that the DOMA impacts marriage and divorce rates differently in DOMA states and non-DOMA states, as discussed *supra*. The second hypothesis pre-

108. An independent-sample mean t-test compares two independent groups to determine whether the average measurement for a particular characteristic differs between two groups. *Statistics Workshops: Tests of Means*, WADSWORTH CENGAGE LEARNING (2005), http://www.wadsworth.com/psychology_d/templates/student_resources/workshops/stat_workshp/test_means/test_means_15.html. I used the Welch-Satterthwaite equation to perform the t-test because the sample sizes differ and the samples possess unequal variances (a measure of dispersion, represented as the average squared distance between the sample's mean and each data-point in the sample).

dicted that the average rate of decline for divorce would be greatest in those states that passed an amendment compared with those states that passed only a statute or nothing at all. The results demonstrated otherwise.

Table Three indicates that no statistically significant difference separated the DOMA and non-DOMA states in the divorce and marriage trends *prior* to enactment of DOMA legislation. The average rate of decline of marriage was greater for the DOMA states than the non-DOMA states prior to the enactment of any amendments, -.25 and -.22 respectively.[109] And for divorce trends, the analysis revealed that DOMA states actually had a greater rate of decline compared with non-DOMA states, -.1 versus -.09, respectively.[110] These extremely slight differences were not surprising and do not rise to the level of statistical significance or substantive significance. Instead, the results established a baseline that prior to DOMA-amendment passage, and the significant publicity associated with it, states of each category were behaving fundamentally similarly with regard to family formation and dissolution—i.e. fewer marriages and fewer divorces.

TABLE THREE

COMPARISON MARRIAGE AND DIVORCE TRENDS BETWEEN DOMA AND NON-DOMA STATES PRIOR TO AMENDMENT PASSAGE

	Marriage Trend	Divorce Trend	n
DOMA	-0.22	-0.1	31
Non-DOMA	-0.25	-0.09	19

But the key question is: What happened after DOMA's enactment? No statistically significant difference marked the two groups of states *after* the passage of DOMA. The average decline in marriage or divorce after DOMA does not differ in any statistically meaningful way between those states that adopted an amendment and those that did not. Post-DOMA, the decline in marriage was *greater* for DOMA states than non-DOMA states, -.26 versus -.12. Moreover, the falling divorce rates were

109. While all measurements discussed *infra* represent average or mean rates of decline, for ease of reading, the text uses the shorthand "decline" to represent this measurement.

110. However, despite a trend of lesser decline in divorce rates prior to DOMA amendment ratifications for non-DOMA states, these states, on average, began with lower divorce rates than DOMA states. It is important not to confuse the average divorce and marriage rates with the average rate of *change* in the divorce and marriage rates. Put another way, DOMA states, prior to the passage of DOMA amendments, had a greater rate of decline in divorce than non-DOMA states, but these states also have lower marriage rates and *greater* divorce rates than non-DOMA states. Accordingly, DOMA states start from a place of greater marital instability than non-DOMA states. *See infra* Part I.D.1.

greater in non-DOMA states than DOMA states, -.011 and -.008, respectively.

It was perhaps surprising that DOMA states, *after* the passage of a DOMA, appear to have a slower rate of decline in divorce *and* an increased rate of decline in marriage compared to non-DOMA states. Put another way, non-DOMA states showed a smaller decrease in marriage rates and a greater decrease in divorce rates compared with states that passed DOMA legislation. However, these results were not statistically significant; however, they were of some social significance: the results suggested some intriguing evolution around the institution of marriage in DOMA states. Specifically, these states, compared with non-DOMA states, already had lower marriage rates, which appeared to be declining further, while also possessing higher divorce rates. Thus, the data suggested that the institution of marriage might be slightly more vulnerable in DOMA states.[111]

While no statistically significant differences emerged between the two groups of states in the analysis, the substantive differences are worth noting. Post-DOMA, the decline of marriage varied quite a bit between the two groups of states. While in all other areas the trends were negligible, the average drop in marriages post-DOMA enactment for DOMA states was more than double that of non-DOMA states. Certainly, the results should be read with caution, but they do raise some skepticism about the power of DOMAs to create family stability. Put simply, DOMAs did not appear to be associated with increased marriages, and for those marriages that did occur, DOMA did not reduce the risk of divorce.

TABLE FOUR

COMPARISON MARRIAGE AND DIVORCE TRENDS BETWEEN DOMA AND NON-DOMA STATES AFTER AMENDMENT PASSAGE

	Marriage Trend	Divorce Trend	n
DOMA	-0.26	-0.008	31
Non-DOMA	-0.12	-0.011	19

This preliminary[112] analysis suggested that DOMA is not statistically associated with increases in marriage rates or decreases in divorce

111. *See infra* Part II.C–D (discussing this study's results regarding marriage and divorce rates and trends).

112. I use the word "preliminary" because this trend data contains a maximum of ten years of analysis. More data is always ideal to truly capture whether trends are emerging. *See* Langbein & Yost, *supra* note 78, at 306–07.

rates.[113] In other words, the analysis did not appear to support either hypothesis. Specifically, DOMA does not appear relevant to the narrative of why marriage plays an increasingly less visible role in family formation in the United States, particularly in DOMA states.[114]

Such a conclusion raises another question, however. If DOMA amendments or statutes are possibly irrelevant to the institution of marriage, what *does* appear to be associated with predicting marriage and divorce rates and trend changes in states?[115]

C. Marriage Trends

We begin with marriage. Prior to the passage of DOMA, three variables predicted, with statistical significance,[116] a state's marriage trend.[117] First, the percent of families living below the poverty line had a moderate correlation (-.47) with the declining marriage trend such that the greater the number of families living in poverty, the greater the decline in a state's marriage rate.[118] In other words, those living in poverty were increasingly less likely to marry than their counterparts with greater resources. Similarly, with a correlation of -.36, the greater the proportion of people in a state who said that religion plays an important role in daily life, the greater the reduction in the state's marriage rate. Thus, more religiosity in a state's population tended to mean fewer marriages. Finally, a correlation of -.35 existed between children living in a single-parent household and the variable, marriage trends. In other words, the greater

113. Given how large the standard deviations were for each group of slopes, and the relatively small but inflexible sample size, achieving enough statistical power to find statistical significance would be incredibly challenging. I ran alternative analyses eliminating outliers in an attempt to decrease the standard deviation and increase the chance of detecting an effect should one exist. But even under the most conservative testing, the sample size must also decrease to accommodate eliminating outliers. Thus, the more compelling story is one of substantive significance rather than statistical significance. "Statistical power" refers to the possibility of making a Type II error, in which we conclude that no difference exists between the means of the two groups when one does. Social science, by convention, recommends no more than a .2 chance of this occurring. WILLIAM M. K. TROCHIM & JAMES P. DONNELLY, RESEARCH METHODS KNOWLEDGE BASE 256–60 (3d ed. 2007).

114. U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT (2004), *available at* http://www.census.gov/population/socdemo/hh-fam/tabCH-1.xls.

115. This question is noteworthy because, while the rates of change do not appear to be statistically significant before and after DOMA enactments for DOMA states over non-DOMA states, the average marriage rates are statistically significant. Marriage seems to be a more robust institution in states that do not have DOMA laws.

116. For each correlation in this section $p < .01$.

117. A full description of correlations of all of these variables appears in Appendix C.

118. "Correlation" refers to the strength of an association between two variables. The coefficient ranges from zero to one, with zero representing no correlation and one representing a perfect positive correlation. DAVID STOCKBURGER, INTRODUCTORY STATISTICS: CONCEPTS, MODELS, AND APPLICATIONS 158 (2d ed. 2001). Correlations in the .4 to .7 range are considered moderate to strong. *See* B. BURT GERSTMAN, SAN JOSÉ STATE UNIV., STATPRIMER 14: CORRELATION, at 14.5, *available at* http://www.sjsu.edu/faculty/gerstman/StatPrimer/correlation.pdf.

the proportion of children living in single parent households in a state, the greater the decline in marriage in that state.[119]

However, a much richer profile of marriage can be developed by examining other characteristics that are associated with the variables which are also correlated with the marriage-decline trend and marriage rates generally. For example, the percent of families living below the poverty line is significantly associated with the number of males and females living in the state who have been married three or more times; the percent who say religion is an important part of daily life; and the number of single-parent households. In each of these relationships, the correlation was positive. In other words, those with families who live below the poverty line are more likely to have married three or more times, to view religion as important to daily life, and to live in a single-parent household with children.

Conversely, a negative correlation linked the variable percent of families living below the poverty line with two other variables—disposable income and the percent of the population with a bachelor's degree. Thus, the greater the median disposable income in the state and the greater the percent of the population in the state with a bachelor's degree, the fewer the percent of families living below the poverty line. Not surprisingly, an extremely strong correlation existed between median disposable income and percent of population with a bachelor's degree.

The next variable, religion as an important part of daily life, shares statistically significant correlations with other traits that flesh out the profile of why certain states have lower or higher declining marriage trends. The median age of marriage for men and women in a state, the median disposable income, and the percent of the population with a bachelor's degree were all negatively related with the percent of the population who view religion as an important part of daily life. Conversely, a positive connection emerged between religion as an important part of daily life and the percent of men and women married three or more times, and the percent of conservatives over liberals living in a state.

Thus, an individual who views religion as an important part of daily life was more likely to have married three or more times, to identify as conservative, to have married young, to have little disposable income or to be living below the poverty line, and is unlikely to have a college degree.

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119. It might appear that single-parent households are an obvious consequence of the decision not to marry or to marry and then divorce. However, out-of-wedlock births play a significant role in access to and stability of marriage in a number of important ways. An out-of-wedlock birth significantly decreases the chances of ever marrying. Births prior to marriage significantly increase the odds that a marriage will end earlier than births that occur after marriage. CASEY E. COPEN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 7–8 (2012).

An analysis of the data after the passage of DOMA revealed almost identical results. Poverty rates and proportion of single-parent households in a state best predict how rapidly the rate of marriage declines in a state. The only variable that was no longer directly associated with post-DOMA marriage trends was religion as an important part of daily life. However, that particular variable strongly mediates[120] every other variable in the profile. Therefore, we can conclude that the passage of state DOMA amendments had no measurable association with stemming the decline of marriage, but, in fact, other variables most certainly did.

D. Divorce

The divorce-trend analysis revealed almost identical patterns to those for marriage. Pre-DOMA divorce was negatively correlated with the proportion of the population with families living in poverty or in single-parent households. These associations are moderate, -.4 for both.[121] As with the marriage analysis, the same variables exhibited an indirect relationship with divorce, which were mediated through the poverty and single-parent household variables. Thus, states with a higher percentage of individuals who have a bachelor's degree also have a higher percentage of individuals with a larger amount of disposable income, who marry at a later age, who are less likely to marry three or more times, who are less likely to be politically conservative, and who are less likely to believe religion is an important part of daily life. And, in turn, these states had fewer families living in poverty and children living in single-parent households.

States that meet this profile had lower divorce rates even though the average *trend in the decline of divorce* is not statistically significantly different from those states that had a larger portion of their population without a college degree, with less disposable income, who marry young,[122] who view religion as an important part of daily life, who marry three or more times, and who are more likely to be conservative.[123] Stated simply, both types of states were experiencing a decreasing divorce trend (and continue to do so); but overall, impoverished states had fewer marriages, but more divorces than those states with greater resources.

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120. "Mediates" is a statistical term of art that means one variable is not directly associated with another, but may affect a third variable through its association with the second one. Reuben M. Baron & David A. Kenny, *The Moderator-Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERSONALITY & SOC. PSYCHOL. 1173, 1176 (1986).

121. Importance of religion no longer has a direct relationship with divorce trends. However, it has an indirect relationship with the two key variables as well as the other mediated variables.

122. "Young" refers to an age of marriage below the national median for age of first marriage.

123. Recall that achieving statistical significance with a small sample that includes very large standard deviations is virtually impossible when the possible effects are marginal to begin with, but the analysis does reveal what is statistically significantly associated with marriage and divorce trends as discussed above. *See supra* note 113.

1. Discussion

The analysis suggests that DOMA states did not fare any better than non-DOMA states in terms of the strengthening of the "bonds and benefits to society of heterosexual marriage."[124] In fact, the analysis offers an alternative theory. In this study, DOMA states tended to have lower marriage rates, larger declines in the trend towards marriage,[125] and greater divorce rates. Moreover, the decrease in the relevancy of marriage and the greater divorce rates in DOMA states for those individuals who actually were married (and remarry) seem to be directly related with poverty and indirectly related with educational and economic opportunities.

These results raise the following question: If DOMA is so clearly *not* associated with the strength of marriage—yet poverty, education, and economic opportunities clearly are—why then, does DOMA carry the political and legal traction that it does as a response to the concern around family instability?[126] The next section attempts to address this question with a moral entrepreneurism theoretical model.

II. THE ENDURING ATTRACTION OF DOMA

A. Moral Entrepreneurism

Howard Becker developed the idea that the construction and application of deviance labels (in the case at hand, homosexuals demanding access to marriage) is a moral enterprise.[127] Individuals draw on power and resources from social structures and cultural institutions to create the abstract notion of something or someone as deviant.[128] Those who define certain behaviors or characteristics as deviant are known as moral entrepreneurs.[129] Relying on interest groups, moral entrepreneurs engage in a multistep process to label a group or behavior as deviant because of the moral entrepreneurs' fear, distrust, or suspicion of this group.[130] The stages include generating awareness and moral conversion.[131]

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124. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 14–15 (1st Cir. 2012) (articulating the goals of enacting DOMA).

125. Recall that trend analysis looks at average changes in the rates of marriage from one year to the next over a specific time period. Rate analysis looks at one period of time. *See supra* notes 96 and 103.

126. *See, e.g.*, Patrick H. Caddell & Douglas E. Schoen, *Romney, Obama Must Address Crisis of U.S. Families*, POLITICO (June 12, 2012, 21:27 EDT), http://www.politico.com/news/stories/0612/77338.html (arguing that the hidden election issue is the crisis of the family and the serious implications that arise from it, which both parties and candidates are ignoring, as well as other cultural institutions, and expressing the key concern that only 52% of the U.S. population is married—the lowest rate ever recorded in the census).

127. HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 162–63 (1963).

128. PATRICIA A. ADLER & PETER ADLER, CONSTRUCTIONS OF DEVIANCE: SOCIAL POWER, CONTEXT, AND INTERACTION 149 (7th ed. 2012).

129. *Id.*

130. *Id.* at 150.

131. *Id.* at 150–52.

Moral entrepreneurs define a problem and create public consciousness of it by generating danger messages.[132] In the present case, the problem is the perceived weakening of the institution of marriage and family, which are supposedly embattled. The danger message is that marriage is under attack by an already well-defined deviant group—homosexuals—who wish to further undermine matrimony's meaning as a union between opposite-sex individuals.[133]

To increase the credibility of their claims, moral entrepreneurs engage experts with specific knowledge of the social problem to package and present facts via media outlets in an attempt to show that the social problem's origins are highly influenced by another social issue.[134] Here, the social problem is the vulnerability of marriage as a central institution of the family, and the connected social issue is homosexual couples.[135]

With regard to the assault on marriage by same-sex couples, a multitude of social science studies[136] employed by a host of statistic-touting experts[137] showing the rise in incidence of divorce, decline in marriage,

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132. *Id.*

133. Observe, though, that the social ills defined as attacking the institution of marriage all implicate women. Recall, the federal DOMA legislation was prefaced with language that stated to the effect that, to permit same-sex marriage "would further devalue an institution already reeling from no-fault divorce, the sexual revolution, and out-of-wedlock births." *See supra* note 23 and accompanying text. After all, the National Association of Women Lawyers drafted legislation to promote no-fault divorce. SELMA MOIDEL SMITH, STANFORD U., WOMEN'S LEGAL HIST., A CENTURY OF ACHIEVEMENT: THE CENTENNIAL OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS (1998), *available at* http://wlh.law.stanford.edu/wp-content/uploads/2011/01/smith-a-century-of-achievement.pdf; *see* Sharon Johnson, *No-Fault Divorce: 10 Years Later, Some Virtues, Some Flaws*, N.Y. TIMES, Mar. 30, 1979, at A22. Women were the key drivers behind the sexual revolution. *See generally* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963); MARGARET SANGER, WHAT EVERY GIRL SHOULD KNOW (1916). Finally, women seem to be blamed for the rise in out-of-wedlock births. *See generally* Isabel Sawhill, *20 Years Later, It Turns out Dan Quayle Was Right About Murphy Brown and Unmarried Moms*, WASH. POST OPINIONS (May 25, 2012), http://www.washingtonpost.com/opinions/20-years-later-it-turns-out-dan-quayle-was-right-about-murphy-brown-and-unmarried-moms/2012/05/25/gJQAsNCJqU_story.html (the author, a Brookings Institute Fellow, arguing that Dan Quayle was correct in criticizing women for raising children without the father present and calling it just another "lifestyle choice").

134. ADLER & ADLER, *supra* note 128, at 150–51.

135. In support of his animus analysis, Justice Kennedy cited to the following passages from DOMA's legislative history: "The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting H.R. REP. NO. 104-664, at 12–13 (1996)) (internal quotation mark omitted). "The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'" *Id.* (quoting H.R. REP. NO. 104-664, at 16 (1996)).

136. *See, e.g.*, Mark R. Schneider, *In Defense of Marriage: Preserving Marriage in a Post-modern Culture*, 17 TRINITY L. REV. 125, 142, 151 (2011); Lynn D. Wardle, *The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage*, 25 BYU J. PUB. L. 287, 308–09 (2011).

137. For example, Brian Brown, President of the National Organization for Marriage, Tony Perkins, President of the Family Research Council, Dale Showengerdt, legal counsel for the Alliance Defense Fund, and Jim Daly, President of Focus on the Family, all hold themselves out as experts on the issue. *See, e.g.*, Brian Brown, *NOM Blog*, NAT'L ORG. FOR MARRIAGE, http://www.nomblog.com/ (last visited June 12, 2014); *FRC Staff: Tony Perkins: President*, FAM. RES. COUNCIL, http://www.frc.org/get.cfm?i=by03h27 (last visited June 12, 2014); *Why Protect Marriage: The Key to Understanding the Fight for Marriage*, CENTER FOR ARIZ. POL'Y (July 29,

increase in adultery, etc.[138] to bring about a moral conversion.[139] A few key ingredients make conversion particularly effective. First is the linkage of the social ill—the decline of the married family—with a "dangerous class,"[140] homosexuals desiring same-sex marriage.[141] The next ingredient is what Reinarman refers to as "A Kernel of Truth."[142] The perceived social ill has some basis of truth to it. Specifically, marriage rates had been declining and the divorce rate did rise in the two decades preceding the moral entrepreneurs' perceived need to respond to "families in crisis" in the early 1990s.[143]

Also, the media play a key role in the "routinization of caricature."[144] In other words, episodic events appear as epidemic; additionally, worst-case scenarios appear as typical ones, which dramatize the social problem.[145] Applying this concept here, we need to look no further than the context analysis described in the prior section, which outlines the discourse behind the rationales for passing a state DOMA amendment.[146] The most recent state to pass a DOMA amendment, North Carolina, provides two good examples of these techniques.[147] First, an issue policy brief asserted that in same-sex-marriage states, teachers are required to teach homosexuality to elementary school children as part of a set cur-

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2011), http://blog.azpolicy.org/marriage-family/why-protect-marriage-the-key-to-understanding-the-fight-for-marriage/; Jim Daly, *Messages from Our President*, FOCUS ON FAM., http://www.focusonthefamily.com/about_us/profiles/jim_daly/messages.aspx (last visited June 12, 2014).

138. *See, e.g.*, Brief for U.S. Conference of Catholic Bishops et. al. as Amici Curiae Supporting Defendants-Appellants at 16–21, Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2011) (Nos. 10-2204, 10-2207, 10-2214), 2011 WL 494356.

139. ADLER & ADLER, *supra* note 128, at 152.

140. CRAIG REINARMAN, THE SOCIAL CONSTRUCTION OF DRUG SCARES (1994), *reprinted in* CONSTRUCTIONS OF DEVIANCE: SOCIAL POWER, CONTEXT, AND INTERACTION 159, 165 (Patricia A. Adler & Peter Adler eds., 7th ed. 2012). Although Reinarman has developed a theory related to drug scares, I assert that this model has equal application to the same-sex marriage issue.

141. Reinarman observes that drug scares are about the use of a drug by particular groups of people who are typically *already* perceived by powerful groups as some kind of threat. *Id.* (citing TROY DUSTER, THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT (1970)). Reinarman observes that Prohibition was motivated by the alcohol usage of immigrant, Catholic, working-class drinkers, not alcohol consumption generally. *Id.* Likewise, drug laws in California came about not because of opiate usage by the masses, but because of Chinese opium dens. *Id.* Finally, the drug war of the 1980s emerged not when college kids started snorting cocaine, but when crack cocaine could be linked to lower class African-Americans. *Id.* In each instance, the social problem is linked to a group perceived as a threat. *Id.*

142. *Id.* at 163.

143. COONTZ, *supra* note 3, at 263 (pointing out that by the end of the 1970s, the divorce rate's effect was exacerbated by alternatives to marriage and the radical reduction in remarriages, generally); Amitai Etzioni, *The Family: Is It Obsolete?*, 14 J. CURRENT SOC. ISSUES 4 (1977) (asserting that if the divorce rate continued at its current pace, not one American family would remain intact by the 1990s).

144. REINARMAN, *supra* note 140, at 163 (emphasis omitted).

145. *Id.*

146. See *supra* Part I.A for a detailed discussion of the content and language employed in the media to rationalize the passage of DOMA amendments.

147. N.C. CONST. art. XIV, § 6 (approved 2012).

riculum.[148] However, this assertion relied on one extreme example for support.[149] Second, the policy brief alleged that religious leaders have been jailed for speaking out against homosexuality.[150] For support, the brief cites to a general assertion that this jailing occurs in Canada.[151] What is particularly compelling with this technique is the idea that a vulnerable population is at risk, and the effects of the social problem are spreading to that population.[152] In the instant case, children are at risk if same-sex marriage is allowed.[153] Not just children of same-sex couples, mind you, but *all* children are threatened.[154]

The final ingredient in this moral enterprise is scapegoating. Scapegoating blames the effects of a social problem on a particular group who are only tangentially related to the social ill.[155] Moreover, these effects

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148. "In states where same-sex 'marriage' is legal, such as Massachusetts, children are taught in school that homosexuality is normal, and that same-sex unions are the legal and moral equivalent of traditional marriage." N.C. FAMILY POLICY COUNCIL, THE MARRIAGE PROTECTION AMENDMENT: TEN REASONS WHY LEGISLATORS SHOULD LET THE PEOPLE VOTE 4, *available at* http://ncfamily.org/issuebriefs/110301-IB-MarProtAmdt.pdf (last visited Apr. 13, 2014).

149. The brief states:

> For example, a lesbian teacher in Massachusetts, who teaches sex education to 8th graders, told National Public Radio (NPR) that she answers students' questions about homosexuality using a chart listing different sexual activities, and then asks them whether two people of the same sex can engage in those activities. She told NPR she asks students, "Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, 'Hold it. Of course, they can. They can use a sex toy.'" She also said her response to any challenges from parents would be, "Give me a break. It's legal now."

Id.

150. *Id.*

151. *Id.*

152. For example, Richard McCorkle and Terance Miethe noted in their study on the response to gangs through moral panics that attention to the alleged problem grew rapidly when the media reported the "apparent movement of gang activity . . . from the traditionally 'troubled' neighborhoods to recreation centers, theaters, and public schools across the city." Richard C. McCorkle & Terance D. Miethe, *The Political and Organizational Response to Gangs: An Examination of a "Moral Panic" in Nevada*, 15 JUST. Q. 41, 48 (1998). The authors also observed that attention increased once again when an outbreak of high school violence was attributed to gang movement from the street to high school campuses. *Id.* at 49–50. Finally, a school shooting in a high school cafeteria was described by police as a "gang-related slaying," although such conclusion was never confirmed. *Id.* at 50 (internal quotation marks omitted).

153. Sarah Wildman, *Children Speak for Same-Sex Marriage*, N.Y. TIMES, Jan. 21, 2010, at E1 (discussing the debate over the effects of same-sex marriage on children and referencing the following position shared by same-sex marriage opponents: "'The real question is whether same-sex relationships benefit children to the same extent that living with a married mother and father does, and we believe they do not,' said Peter S. Sprigg, senior fellow for policy studies at the Family Research Council, the conservative Christian organization. 'Children do best when raised by their own biological mother and father who are committed to one another in a lifelong marriage.'"); *see supra* Part I.A (detailing the ways in which children will be harmed by same-sex marriage according to DOMA proponents).

154. Creating this illusion is crucial because, according to Erich Goode and Nachman Ben-Yehuda, disproportionality, or the degree that the public focuses concern on the problem—here, same-sex marriage as the cause of family disintegration—to the exclusion of far more damaging (and realistic) sources of the crisis, such as poverty, access to education, and stable employment, determines the viability of the moral panic. ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 36 (1994).

155. A closely related term refers to scapegoats as "folk devils" because their behaviors are deemed selfish and harmful to society. *Id.* at 29. It becomes paramount to neutralize their actions so society can return to normal. *Id.*

usually precede the alleged causal connection between the social problem and the identified deviant group.[156] Reinarman argues that scapegoating may be the most essential element of the process because "it gives great explanatory power and thus broader resonance to claims about the horrors of [the social problem]."[157] Scapegoating same-sex families is equally cogent in the DOMA campaign.

B. Moral Panics

Blaming homosexual couples as the source of the United States' ongoing family crisis was particularly effective because the social problem was acutely ripe for a moral panic.[158] The public was predisposed to believe the notion that the "family in crisis" had hit epidemic proportions, especially when infamous or noteworthy individuals declared it so.[159] In turn, legislators responded to the moral panic with the rapid en-

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156. Volatility is also a crucial ingredient. The issue seems to erupt suddenly. Same-sex marriage as the cause of family crisis erupted suddenly when the Hawaii Supreme Court's decision striking down legislation that barred same-sex couples from marrying. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). While the issue of family in crisis had always had political attraction, the redefining of marriage by a court to include same-sex couples gave it new life. Recall that during the 1992 Clinton campaign, families were in crisis because of "welfare queens." Clarence Page, *Romney's Welfare Queen*, CHI. TRIB., Aug. 12, 2012, at 25. Another interesting example comes from Great Britain. In 1968, Mary Bell, at the age of 11, killed two toddlers. Ann Bradley, *A Morality Play for Our Times*, 63 LIVING MARXISM 10, 13 (1994). In contrast, when in the early 1990s two boys killed a toddler, a moral panic ensued because the act was emblematic of the decline of British society. *Id.* at 10. The result was a series of legislative enactments to solve the problem of children murdering children. David Smith & Kiyoko Sueda, *The Killing of Children by Children as a Symptom of National Crisis: Reactions in Britain and Japan*, 8 CRIMINOLOGY & CRIM. JUST. 5 (2008), *available at* http://www.sagepub.com/lawrencestudy/articles/intro/Smith.pdf. And, as is the case with DOMA and same-sex marriage, evidence that the enacted solutions would solve the "crisis" was irrelevant.

157. REINARMAN, *supra* note 140, at 165.

158. "Moral panic" refers to a situation in which public fears and state response greatly exaggerate the alleged threat attributed to the target group. The concept emerged from studies Stanley Cohen conducted in Britain in the 1960s on the "Mods and Rockers." Cohen characterized a moral panic as a situation where a social ill or group of persons is identified as a "threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, [and] politicians . . . ." McCorkle & Miethe, *supra* note 152, at 43 (quoting STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF MODS AND ROCKERS 9 (1972)).

159. For example, Dr. James Dobson, founder of Focus on the Family, asserted in 2004, at the height of DOMA amendment campaigns, that:

> The legalization of homosexual marriage will quickly destroy the traditional family.
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> . . . .
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> . . . [W]hen the state sanctions homosexual relationships and gives them its blessing, the younger generation becomes confused about sexual identity and quickly loses its understanding of lifelong commitments, emotional bonding, sexual purity, [and] the role of children in a family . . . .

JAMES DOBSON, MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS BATTLE 47 (2004). Judson Phillips, founder of the Tea Party Nation, was quoted in an article as declaring that:

> [M]arriage equality for gays and lesbians is part of the "east coast liberal freak show" bent on ruining America . . . .
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> . . . .
>
> While there are many religious and moral arguments that can be made about this, the simple fact is for the last sixty years or so[,] the left has been attacking the basic family unit. The end result of this has been the creation of poverty where none existed before. It has been the creation of an under class, born and raised in poverty, unlikely to escape

actment of DOMA at the federal level with individual states quickly following suit.

Moral panics can play a crucial role for those possessing political, economic, or religious power.[160] Often, the creation of such a panic can distract from a more intractable social issue. For example, when Britain was suffering from a severe recession in the 1970s, the ruling class created a moral panic around street crime to distract the public from the country's declining economic situation. "By exploiting the public's fear of crime, the ruling class shifted the focus from an ailing British economy to street muggings, thereby protecting their own economic interests . . . ."[161] Similarly, one might argue that emphasizing same-sex marriage as the cause of what ails the American family served the power elite. It diverted attention away from the glaring reality of economic policies that benefited the power elite at the expense of particular types of American families.[162]

Most fascinating is the framing that the conservative family policy groups employ to implicate what has occurred over the last few decades as an "American Experiment."[163] Indeed, even one of the attorneys arguing against the legalization of same-sex marriage before the Supreme Court invoked the term.[164] The Institute for American Values observes that a clear dividing line demarcates marital access and stability between

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poverty and encouraged to engage in the same behaviors that landed their parents in poverty.

Tashman, *supra* note 71 (quoting Judson Phillips in a statement to Tea Party Nation members on May 31, 2012).

160. Often these power roles work in tandem. For example, many politicians hold political power along with a significant largesse and use this power to express unabashed religious views—George W. Bush, Mitt Romney, and Sarah Palin, to name a few. Indeed, the most successful moral crusaders are those in the upper strata of society. Research conducted on the pro-life movement and anti-pornography revealed that the crusaders originated in the lower class, thus explaining their limited success—until recently—to have these issues reframed as legally unacceptable. Justin L. Tuggle & Malcolm D. Holmes, *Blowing Smoke: Status Politics and the Shasta County Smoking Ban*, 18 DEVIANT BEHAV. 77, 79 (1997).

161. McCorkle & Miethe, *supra* note 152, at 44 (citing STUART HALL ET AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER (1978)). Moral Panics certainly take on a phenomenological life of their own, but beforehand individuals or groups carefully put the key ingredients in place.

162. Professor Carbone observes that "[t]he family crisis is tied to a changing economy; yet that economy is largely invisible in the moral-values debate." Carbone, *supra* note 49, at 355. She goes on to note that "[same-sex marriage bans] simply serve to keep anxiety about the American family alive without doing anything to address the country's real needs. A genuine family agenda would take the initiative in addressing the country's changing economic circumstances, starting with employment." *Id.* at 356.

163. UNIV. OF VA. NAT'L MARRIAGE PROJECT, WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 15 (W. Bradford Wilcox & Elizabeth Marquardt eds., 2010), *available at* http://stateofourunions.org/2010/SOOU2010.pdf. *But see* Carbone, *supra* note 49, at 356 (arguing that the ability to marry and stay married is defined by educational attainment and class).

164. Steven T. Dennis & John Gramlich, *12 Best Gay Marriage Moments at the Supreme Court*, ROLL CALL (Mar. 26, 2013, 4:22 PM), http://www.rollcall.com/news/12_best_gay_marriage_moments_at_the_supreme_court-223456-1.html.

the classes.[165] However, the dividing line has clearly shifted in the last few decades such that the middle class now find themselves shut out at the proverbial church door. The "most consequential marriage trend of our time concerns the broad center of our society, where marriage, that iconic middle-class institution, is floundering."[166] The report couches the lack of access to marriage as a "retreat"[167]—perhaps unintentionally—suggesting that the middle class made a conscious decision to try out what it would be like to not marry for a generation or so.

Conversely, marriage stability has remained consistently strong for the last four decades amongst the educated upper class and upper-middle class.[168] Thus, one might be tempted to conclude that DOMA was especially needed in those states that lacked educational and economic resources to stave off the impending attack on a set of marriages already weakened and becoming increasingly rarified. Taken to its logical conclusion, the argument might go like this: of course states with higher educated populations, with more income, and with delayed age of first marriage could withstand same-sex marriages amongst its population. These are not the types of states with the most marriages at risk.

Therein lies the appeal of the moral panic to the family in crisis question.[169] Status politics play out an efficient and effective one-two

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165. The institution's report, in combination with another one it authored, *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs*, is emblematic of moral entrepreneurs effectively creating a moral panic. *See generally* UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163; ELIZABETH MARQUARDT, INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS (2006), *available at* http://www.americanvalues.org/search/item.php?id=48. In fact, these reports could serve as a textbook for how to create a moral panic around family crisis. They contain the requisite academic experts explaining how middle America's attitudes and behavior do not serve them well, as such attitudes seek to adopt a "'soul mate' model of marriage" over the "older 'institutional' model of marriage." UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163, at 28. Marquardt discounts studies demonstrating that same-sex marriage is not harmful. MARQUARDT, *supra*, at 19–22. Moreover, Marquardt devotes a significant portion of her report to establishing that a vulnerable population exists when she writes, "[I]n both the sciences and in the voices of children we learn that biology *does* matter." *Id.* at 21. She discusses the safety of children—and the risks of stepparents who lack biological connection to children in the household. *Id.* at 20. She then equates these violent stepparents with same-sex parents. *Id.* at 21–22. However, citing recent developments in artificial reproduction that involve creating eggs and sperm from stem cells, she cautions, "The technique raises the possibility that gay couples will be able to have biological children." *Id.* at 27 (quoting Maxine Firth, *Stem Cell Babies Could Have Single Parent*, N.Z. HERALD, June 21, 2005) (internal quotation marks omitted). Seemingly, same-sex couples cannot win. They are unacceptable parents without both having a biological connection to the child, and frankly, unfit parents because, as selfish folk devils, they view "human lives as fit for laboratory experimentation for the benefit of others." *Id.* at 27–28.

166. UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163, at ix.

167. *Id.* at 15.

168. *Id.* at 16.

169. Moral panics allow for selective application of the scapegoat to the social ill according to where it conveniently fits to support the narrative being offered. Power is central to this enterprise.

> [L]aws . . . are a product of political action by moral entrepreneurial interest groups that are connected to society's power base. . . .
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> . . . .

punch. First, the power elite can define certain kinds of families as lacking in social mores, i.e. poor and middle class single-parent families, while at the same time, implicating other kinds of families as exacerbating the first social ill, i.e. same-sex families. Second, the condemnation of both groups "symbolically enhances the status of the abstinent through the degradation of the participatory."[170] In other words, the power elite legitimizes its superior moral value and superior position in the social stratification through such discourse. In the case of same-sex couples' demand for marriage, moral entrepreneurs engaged in "coercive reform"[171] because these couples were "viewed as intractably denying the moral and status superiority of the [political-economic-religious elites'] symbolic-moral universe."[172] And, at the same time, this "reform" distracted families who were experiencing their own massive instability from examining the cause of their own plight.

Thus, a fair conclusion to draw might be that same-sex couples' desire to marry has little to do with the current state of marginalized families and perhaps has much to do with a carefully crafted moral panic for political expediency.[173] In other words, DOMA could very well be a by-product of a fallacy.

The next query becomes, then, given the variables associated with marital instability and given DOMA's apparent ineffective role in promoting marital stability (and its possible demise), how should society respond to the middle class's weakened marital state?

III. RECOMMENDATIONS

Given that marriage, as an institution, has become a less viable option, especially for the middle and lower classes, one may be tempted to lay blame at their feet. The nature of this blame may come in a variety of forms. These forms are discussed below, followed by my recommendations for solving the effects of the middle class's weakened marital state.

A. Moral Failure

One approach might be to adopt the reasoning of the conservative elite—both within the academy and political arenas—that middle and

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> . . . [T]hose positioned closer to the center of society, holding the greater social, economic, political, and moral resources, can turn the force of the deviant stigma onto others less fortunately placed.

ADLER & ADLER, *supra* note 128, at 155–56.

170. Tuggle & Holmes, *supra* note 160, at 79.

171. *Id.* "Coercive reform" refers to the enactment and enforcement of laws to force a particular group to comply with moral views espoused by the moral entrepreneur. *Id.* at 79–80.

172. *Id.*

173. Admittedly, I do not have direct evidence that pro-DOMA interest groups developed a purposeful strategy to create a moral panic, but rather, I infer from the discourse that theoretically, it appears this sociological phenomenon emerged.

lower classes do not act consistently with their best interests.[174] For instance, the National Marriage Project and Institute for American Values diagnose the problem as follows: Marriage has eroded in the middle class because "moderately educated Americans are markedly less likely than are highly educated Americans to embrace the bourgeois values and virtues."[175] To put it bluntly, the report explains that lower middle class individuals are less likely to engage in self-control, delayed gratification, and hard work.[176] These virtues, the report claims, are the key to accessing a college education, and in turn, adopting an appropriate life planning sequence—"education, work, marriage, and childbearing" in that order.[177]

The culpability of the "shiftless"[178] certainly has its appeal—particularly when academics or politicians can point to the models of marriage that are appropriate for one social class, but not the other. *The State of the Union* report observes that while a "soul mate" model of marriage may work for upper class Americans, middle class Americans must abide by the "traditional" model of marriage in which "poor and Middle Americans of a generation or two ago would have . . . been markedly more likely to get and stay married, even if they did not have much money or a consistently good relationship."[179] According to the

174. Ronald Reagan often played up the concept of the "welfare queen" in his stump speeches during his 1976 election bid to describe women who were scamming the government to obtain benefits and services for themselves and their children instead of working for pay. *See 'Welfare Queen' Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51. While Reagan is often credited for coining the term "welfare queen", this is likely apocryphal as no actual record exists of Reagan's use of the term. In actuality, the inventor of the term seems to be Linda Taylor at "the *Chicago Tribune*, not the GOP politician." Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.

175. UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163, at 34.

176. *Id.*

177. *Id.*

178. "Shiftless" is a term that came about during the slavery era to describe African-American slaves as lazy, unambitious, and slow, but it currently has wider application to poor people. *See* David Pilgrim, *The Coon Caricature*, FERRIS ST. U. (Oct. 2000), http://www.ferris.edu/jimcrow/coon/ (last updated 2012).

179. UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163, at 38–39. The soul mate model of marriage is couple-centered, demanding "emotional intimacy" and "shared consumption" with the "happiness of both spouses" as central to its survival. *Id.* at 38. Conversely, the traditional model of marriage focuses on "parenthood, economic cooperation, and emotional intimacy in a permanent union." *Id.* at 38. However, consider Stephanie Coontz's assessment of marriages and families from a generation or two ago, when the conservative elite would wax on about the ideal approach for middle America. "Not only was the 1950s family a new invention; it was also a historical fluke, based on a unique and temporary conjuncture of economic, social, and political factors." STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 28, 30–39 (1992). Coontz observed that, in reality, families during this period were characterized as one or both partners experiencing daily misery; families hiding the sexual or physical abuse that occurred within the family from the outside world; women who had been pushed out of the workforce became alienated wives and mothers. The media's depiction of the 1950s American family ignored the poor communities and minorities, who continued to face brutal discrimination. The period consisted of a consistent heightened number of teen pregnancies, which resulted in marriage, as well as high rates of prescription drug and alcohol abuse. *Id.* at 29–39. Moreover, while the American Values Institute

Institute for American Values, the poor and middle classes don't have the economic resources needed to succeed in an emotionally intensive soulmate union.[180]

This analysis suggests shades of the 1965 Moynihan Report, in which then Assistant Secretary of Labor, Daniel Moynihan, concluded that the pathology of the African-American community had its origins in the destabilized "Negro" family.[181] The report has since been criticized for its failure to examine all the data on black families available at the time, and in particular, for its failure to acknowledge the adaptive strategies that family formation will take in response to destabilized institutions, especially the economy.[182] Similarly, here, one might conclude that a destabilized family is a *consequence*, not a cause—no more than same-sex marriage would be a cause—of weakened social structures.[183]

Another explanation of middle class families' plight is the cultural class-warfare syndrome as expressed in volumes such as *What's the Matter with Kansas*?[184] Under this model, middle class Americans are at fault for their circumstances because they vote against their own interests.[185] Frank observes that we have a "French Revolution in reverse."[186] The wealthy elite, politically conservative establishment developed a highly effective discourse he calls "latte libel."[187] Instead of focusing on policy

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criticizes the soul mate model as valuing consumption, Coontz points out that the "traditional family" of the 1950s was defined by consumer consumption. *See id.* at 27–29.

180. UNIV. OF VA. NAT'L MARRIAGE PROJECT, *supra* note 163, at 38–40.

181. *See generally* DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), *available at* http://www.dol.gov/oasam/programs/history/webid-meynihan.htm.

182. Herbert J. Gans, *The Moynihan Report and Its Aftermaths: A Critical Analysis*, 8 DUBOIS REV. 315, 318–20 (2011) (arguing that the report lacked the positivism required for such analysis to have a meaningful effect).

183. In the early part of the twentieth century, sociologists Robert Park and Ernest Burgess developed the Concentric Zone theory. *See* ROBERT E. PARK ET AL., THE CITY 50–55 (1925). The theory explains that competition for resources means that certain land areas with limited social structures will lead to adaptations by individuals living in those areas subject to the same ecological pressures. *See id.* at 63–66. Thus, the idea that individuals develop characteristics in response to the environment and resources available to them is not a new one.

184. *See generally* THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA (2004). Although culture as an expression of class has long been debated by sociologists, Frank's book describes how the political mapping of the 2000 election brought the intersection of politics and class warfare into sharp relief as mediated through culture. For an earlier discussion of the cultural class-warfare syndrome, see MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES 14–17 (1962). The idea of culture as an expression of class has captured the imagination of family law scholars more recently. *See generally* CAHN & CARBONE, *supra* note 89; WILLIAMS, *supra* note 18.

185. Recent data, however, suggests otherwise. A report released by the PEW Foundation reveals that 50% of its respondents who stated that they were middle class identified as Democrats, compared to 39% who identified as Republicans. PAUL TAYLOR ET AL., PEW RESEARCH CTR., THE LOST DECADE OF THE MIDDLE CLASS: FEWER, POORER, GLOOMIER 6 (2012), *available at* http://www.pewsocialtrends.org/files/2012/08/pew-social-trends-lost-decade-of-the-middle-class.pdf.

186. FRANK, *supra* note 184, at 8.

187. *Id.* at 16–17.

as the framework for voting in political parties, the economic and political powerhouses shifted politics into a cultural class war.[188]

In this cultural war, middle class Americans were duped into creating a backlash against their own economic interests based on judgments about liberal elitism that comes from the coastal regions of the United States—the cars they drive, the food they eat, the clothes they wear, the music they listen to, the places where they vacation, the churches they do not attend, etc.[189] The net result, according to Thomas Frank, is that:

> Here is a movement whose response to the power structure is to make the rich even richer; whose answer to the inexorable degradation of working-class life is to lash out angrily at labor unions and liberal workplace-safety programs; whose solution to the rise of ignorance in America is to pull the rug out from under public education.[190]

But Frank and those of his persuasion cast blame more broadly. They point to the liberal, political, and economic elite as culpable too.[191] Frank argues that the Left made an inexcusable error in refusing to talk about class; in attempting to reframe itself as a party friendly to business; and abandoning the issues that made the Democratic party appealing.[192] The Left has engendered a deep-seated bitterness in middle-America that is aimed at the once progressive platform of the Democratic party.[193] Joan Williams goes further: "A precondition for permanent political change is a changed relationship between the white working-class and the reform-minded elite. It is disheartening that . . . the upper-middle class remains supremely uninterested in rethinking its relationship with the Missing Middle."[194] Thus, these authors argue that the liberal elite drove middle class Americans away with their condescension and intellectual analysis, and into the hands of the Republican Party, which was willing to embrace their anger—or more accurately, manipulate it for political gain.[195]

The result is that the nation has economic and family policies that have led to a high level of inequality. To be sure, the last thirty years has seen the distance grow between the social classes.[196] But during the Great Recession and subsequent recovery, in 2010 alone, the top 1% of America's most wealthy gained 93% of the *additional* income created in the

188. *See id.* at 5–6.
189. *See id.* at 16–20.
190. *Id.* at 7.
191. *Id.* at 242–48.
192. *Id.*
193. *Id.* at 8–9, 176–77.
194. WILLIAMS, *supra* note 18, at 211.
195. *See id.* at 212.
196. *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 2–3 (2012).

United States.[197] During this same year, the ratio of pay between a typical worker (a person lucky enough to have a job) and a CEO's annual compensation was one to 243.[198] Put another way, the top 1% had an average annual income of $1.3 million while the bottom 20% earned an average of $17,800 annually—and that was before the recession hit.[199] It seems implausible to maintain that such incredible economic injustice does not hurt the stability of the family.

A recent study released by the PEW Foundation catalogues the losses experienced by the middle class. Of the 1,287 adults surveyed for the study, 85% stated that it was more difficult to maintain a standard of living than a decade ago.[200] For the first time since World War II, income has declined across all income tiers except the very top.[201] The size of the middle class has actually shrunk over each of the last four decades.[202] For the upper class, the period has proved lucrative. Their incomes rose from 29% to 46% of the nation's pie.[203] For the middle class, four decades ago, their income made up 62% of the share.[204] Now, it is only 45%.[205] The lower class has remained relatively stable in its minimal share of the nations' income—10% in 1971, 9% in 2011.[206]

Wealth remains a crucial, yet elusive safety net for any family. Wealth provides access to resources in times of economic hardships, but even more so, it offers economic opportunities. However, wealth has plummeted for middle- and lower-class families—specifically, by 28% for the middle class and 45% for the lower class over the last four decades.[207] Once again, if you were lucky enough to be born in the upper class, your opportunities improved substantially. Upper-class families acquired a greater portion of the nation's wealth during this same time period.[208]

B. The Elusive Traditional Family

A frequent refrain in the conservative party is a return to the traditional family values of the 1950s—with images of *Leave it to Beaver* reruns fresh in our collective memories.[209] Nostalgic stories of low divorce

197. *Id.* at 3.
198. *Id.*
199. *Id.* at 4.
200. TAYLOR ET AL., *supra* note 185, at 166.
201. *Id.* at 1.
202. *Id.* at 1–2.
203. *Id.* at 2.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 2–3.
208. *Id.*
209. Kevin Noble Maillard, *The Myth of the Traditional Family*, Contribution to *The Opinion Pages: Room for Debate*, N.Y. TIMES, http://www.nytimes.com/roomfordebate/2012/04/24/are-family-values-outdated/the-myth-of-the-traditional-family (last updated Aug. 9, 2012, 11:35 AM).

rates, high marriage rates, high fertility rates, and economic growth—with the largest movement of poor people into the middle class—all certainly have resonance and appeal. However, the family of the 1950s was not the last vestige of a long tradition of the stable American family.[210] It was a new and rare phenomenon born of massive economic growth spurred on by housing starts and consumer spending—particularly for household furnishings and appliances.[211]

Even more so, the traditional family of the 1950s was the invention of American economic and family policy. Keith Olson observes that the GI Bill was one of the most successful social programs ever created, at least for whites.[212] Veterans received free college tuition, a stipend, and extra money if they had a family.[213] No loans, just grants. Mortgages were available at very low rates.[214] A rewritten tax code provided advantages to married couples.[215] Such policies created the middle class, and in turn, the possibility of family stability.

Economic stability did not create the cultural phenomena of the nostalgic "traditional" two-parent, male breadwinner, female home-maker family. The media did.[216] However, the recommendation that we provide economic and educational opportunities to create economic stability is an obvious one that Nobel Prize winner Joseph Stiglitz analyzes forcefully.[217] Nevertheless, the ability to *create family stability* means discarding

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210. ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 13–14 (2008) ("[The 1950s family] was not . . . the last gasp of 'traditional' family life with roots deep in the past. Rather, it was the first wholehearted effort to create a home that would fulfill virtually all its members' personal needs . . . .").

211. *See* Keith W. Olson, *The G. I. Bill and Higher Education: Success and Surprise*, 25 AM. Q. 596 (1973) (discussing the implementation of the GI Bill as an anti-depression measure); COONTZ, *supra* note 179, at 24–25.

212. Olson, *supra* note 211, at 610; COONTZ, *supra* note 179, at 223.

213. Olson, *supra* note 211, at 610 n.18; COONTZ, *supra* note 179, at 223.

214. *See* COONTZ, *supra* note 179, at 223.

215. *Id.* at 223–24. *See generally* MADELEINE M. KUNIN, THE NEW FEMINIST AGENDA: DEFINING THE NEXT REVOLUTION FOR WOMEN, WORK, AND FAMILY 23–24 (2012); STIGLITZ, *supra* note 196, at 4–5.

216. COONTZ, *supra* note 3, at 229–32.

217. Educational opportunities should be carefully assessed to match the growth areas in the economy. For example, regulation of for-profit educational institutions is essential for the protection of lower and middle classes seeking access to higher education—an area where they are frequently shut out. Stiglitz cites data showing that 74% of students in the nation's most selective colleges come from the top quartile of income earnings, while only 9% come from the bottom half of the country's income earners. STIGLITZ, *supra* note 196, at 19. The effects of inequality for a child are pervasive. In fact, a child born in an environment with few resources will find it difficult to ever move out of poverty. *Id.* at 17–20. Recent data reveals that the middle class, who used to believe that the American Dream was achievable, are increasingly alienated from the notion that working hard is all it takes. TAYLOR ET AL., *supra* note 185, at 5. Finally, education cannot be the salve to childhood poverty and family instability. Research shows that the predominant growth area for jobs in the United States in the next decade will be in the service industry—low-paying jobs like home health workers or social service providers, as well as business services. Richard Henderson, *Industry Employment and Output Projections to 2020*, MONTHLY LAB. REV. 65, 65–69 (Jan. 2012), *available at* http://www.bls.gov/opub/mlr/2012/01/art4full.pdf. Therefore, policy must address ways for low-income families to garner support other than through wage income.

a singular notion of a family model[218] that thrived for *only one* decade in our history.[219]

To be sure, a two-parent household offers certain economic advantages.[220] These advantages, however, can be mirrored in a national economic policy without necessarily demanding a two-parent household model. Thus, other family structures can receive these benefits.[221] It is clear from the analysis above that, regardless of one's educational or economic resources, marriage and fertility rates are both declining.[222] America can be a hostile place to raise a child. As of December 2011, 57% of the nation's children are living in low income or poor households.[223] The United States exhibits the "highest child poverty rate in the developed world."[224] Unlike our European neighbors, we seem to focus on marriage, not children.[225] In a nation where "[p]oor kids who succeed academically are less likely to graduate from college than richer kids who do worse in school,"[226] and where we know education strengthens family stability, a new moral panic demands addressing the causes, not the symptoms, of family crisis. Thus, this last section of the paper shifts the focus from marriage and divorce rates to child outcomes. The analysis above suggests that marriage and divorce play an increasingly less visible role in family formation and stability. Thus, concentrating on a child's quality of life is likely to create a setting that will increase family stability.

C. Possible Solutions

1. Reformulate Resources with Children in Mind

As Stiglitz observes, this country virtually eradicated poverty for the elderly through social programs like Social Security and Medicare.[227] The decision to do nothing to eradicate child poverty should be viewed as political as well as moral.[228] I argue that refocusing on children's access to resources will go a long way toward creating family stability,

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218. Indeed, the trend of marriage continues to decline, especially amongst the least educated. Richard Fry, *No Reversal in Decline of Marriage*, PEW RES. CENTER (Nov. 20, 2012), http://www.pewsocialtrends.org/2012/11/20/no-reversal-in-decline-of-marriage/#src=prc-newsletter.

219. *See* COONTZ, *supra* note 3, at 229, 243–44.

220. *See* Wendy D. Manning & Susan Brown, *Children's Economic Well-Being in Married and Cohabitating Parent Families*, 68 J. MARRIAGE & FAM. 345, 351 (2006).

221. In fact, families with three or more parents exist and may receive legal recognition in California. Ian Lovett, *Measure Opens Door to 3 Parents, or More*, N.Y. TIMES, July 14, 2012, at A9.

222. JOYCE A. MARTIN ET AL., NAT'L VITAL STATISTICS SYS., BIRTHS: FINAL DATA FOR 2010, at 1 (2012), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf; *see id.* at Table 1.

223. KUNIN, *supra* note 215, at 223.

224. *Id.* at 11.

225. ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND 15–16 (2010).

226. STIGLITZ, *supra* note 196, at 19.

227. *Id.* at 17.

228. *Id.*

while undermining the scapegoating arguments behind DOMA. Research reveals that Americans strongly value fairness.[229]

The discourse of fairness must enter the family-in-crisis discussion.[230] Other countries have chosen to create a wealth distribution system that still allows for rewards, but reduces the amount of inequality present in society, particularly by focusing on investing in resources for children.[231] In doing so, the Left must respect, if not adopt, the morality discourse with which the Right has become adept. It must re-engage middle- and lower-class America—where the most destabilized families are found.[232]

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229. *Id.* at 153–54.

230. The idea of tax dollars going to assist other adults who we perceive as making life decisions that we would not creates cognitive dissonance for some when it comes to the notion of fairness. *See, e.g.*, *Myth–The Rich Don't Pay Their Fair Share*, CONST. CONSERVATISM, http://constitutionalconservative.wordpress.com/myth-the-rich-dont-pay-their-fair-share/ (last visited Apr. 13, 2014).

231. For example, policies in Australia, the UK, France, and Brazil are known for reducing inequality. *See, e.g.*, KUNIN, *supra* note 215, at 34–35, 44–55, 225–30; STIGLITZ, *supra* note 196, at 5, 18–19, 21–23.

232. The empirical data show that religion plays a central role for these families experiencing destabilization. Thus, reframing the family crisis as one involving a moral crisis around fairness, greed, and hypocrisy can capture the imagination of these families. The Left is inclined to eschew religion, as the data here reveals, but social justice for families is a moral theme. Moreover, the Left must also be mindful of recent research demonstrating that cognitive functioning may play a significant role in political attitude, and thus should focus on finding common ground rather than demanding "conversion" of position. *See, e.g.*, Michael D. Dodd et al., *The Political Left Rolls with the Good and the Political Right Confronts the Bad: Connecting Physiology and Cognition to Preferences*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B 640, 640 (2012), *available at* http://rstb.royalsocietypublishing.org/content/367/1589/640.full.pdf (finding that left-leaning individuals prefer pleasing images while right-leaning individuals prefer unpleasant images); Scott Eidelman et al., *Low-Effort Thought Promotes Political Conservatism*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 808, 808–09, 815, 817 (2012) ("[P]olitical conservatism is promoted when people rely on low-effort thinking. When effortful, deliberate responding is disrupted or disengaged, thought processes become quick and efficient; these conditions promote conservative ideology. . . . [L]ow-effort thought might promote political conservatism because its concepts are easier to process, and processing fluency increases attitude endorsement. . . . Four studies support our assertion that low-effort thinking promotes political conservatism. . . . Our findings suggest that conservative ways of thinking are basic, normal, and perhaps natural." (citation omitted)); Peter K. Hatemi et al., *Genetic and Environmental Transmission of Political Attitudes over a Life Time*, 71 J. POL. 1141, 1141 (2009) ("[A]t the point of early adulthood (in the early 20s), for those who left their parental home, there is evidence of a sizeable genetic influence on political attitudes which remains stable throughout adult life."); Erik G. Helzer & David A. Pizarro, *Dirty Liberals! Reminders of Physical Cleanliness Influence Moral and Political Attitudes*, 22 PSYCHOL. SCI. 517, 517 (2011) ("[R]eminders of physical purity influence specific moral judgments regarding behaviors in the sexual domain as well as broad political attitudes."); Ryota Kanai et al., *Political Orientations Are Correlated with Brain Structure in Young Adults*, 21 CURRENT BIOLOGY 677, 677–79 (2011) (finding that left-leaning individuals are more tolerant of uncertainty while conservatives have greater sensitivity to fear as demonstrated in different parts of the brain); Natalie J. Shook & Russell H. Fazio, *Political Ideology, Exploration of Novel Stimuli, and Attitude Formation*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 995, 995–96 (2009) (stating that, compared to liberals, conservatives are less open to new experiences and learn better from negative stimuli than positive stimuli); Jacob M. Vigil, *Political Leanings Vary with Facial Expression Processing and Psychosocial Functioning*, 13 GROUP PROCESSES & INTERGROUP REL. 547, 552 (2010) ("Republican sympathizers were more likely to interpret the faces as signaling a threatening expression . . . as compared to Democrat sympathizers . . . . Group differences were also found for dominance perceptions, . . . whereby Republican sympathizers were more likely to perceive the faces as expressing dominant emotions . . . than

One way to re-engage the middle class is to discuss the value of human life. Rather than pour political energy into birth control and abortion (both important and necessary social policies—but also potentially alienating issues amongst the religious middle class), we should focus on the need to invest in children from the start. Recall, this study shows a strong correlation between DOMA states and its citizens reporting conservatism and religion as an important part of daily life.[233] Thus, a discussion of policy reform must reframe the discussion in such a way that is respectful to the religious and moral views of the middle class; for example, prioritize prenatal and early childhood care.

By adopting a "trickle up" policy, money invested in children can mitigate some of the weak income levels of their parents.[234] And how do we pay for these investments? Revise the tax code to address the massive and growing economic injustice in this country. Government may not be able to dictate the ratio of pay between worker and CEO, but government can redistribute resources and income through tax policy.[235] The earned income tax credit is one of the most effective tax policies to benefit families.[236]

One highly effective investment is supporting low-income parents in developing strong relationships with their children. Research demon-

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were Democrat sympathizers . . . ."); Darren M. Schreiber et al., Red Brain, Blue Brain: Evaluative Processes Differ in Democrats and Republicans 2–3 (2009) (unpublished APSA Toronto meeting paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451867 ("[I]t appears in our experiment that Republican participants, when making a risky choice, are predominantly externally oriented, reacting to the fear-related processes with a tangible potential external consequence. In comparison, risky decisions made by Democratic participants appear to be associated with monitoring how the selection of a risky response might feel internally."); Kevin B. Smith et al., *Disgust Sensitivity and the Neurophysiology of Left-Right Political Orientations*, PLOS ONE (Oct. 19, 2011), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0025552 ("[I]ndividuals with marked involuntary physiological responses to disgusting images [measured by change in mean skin conductance], such as of a man eating a large mouthful of writhing worms, are more likely to self-identify as conservative and, especially, to oppose gay marriage than are individuals with more muted physiological responses to the same images.").

233. *See supra* Part I.C.

234. This Article offers a couple of the multitude of policies that will need addressing. Welfare reform, for example, demands significant attention if poor children are to gain access to resources that mirror children in two-parent households. Greg Kaufmann, *This Week in Poverty: The Invisibles in Mississippi and the US*, NATION (Sept. 28, 2012, 09:01 EST), http://www.thenation.com/blog/170222/week-poverty-invisibles-mississippi-and-us#. Social security reform represents another area that significantly impacts poor children. Christopher R. Tamborini et al., *A Profile of Social Security Child Beneficiaries and Their Families: Sociodemographic and Economic Characteristics*, 71 SOC. SECURITY BULL. 1, 1, 11 (2011), *available at* http://www.ssa.gov/policy/docs/ssb/v71n1/v71n1p1.html.

235. A report by the Center on Budget and Policy Priorities identified some actions that could improve the lives of the poor and reduce inequality. First among them was reforming state tax policy to make it progressive rather than regressive. ELIZABETH MCNICHOL ET AL., CTR. ON BUDGET & POLICY PRIORITIES, ECON. POLICY INST., PULLING APART: A STATE-BY-STATE ANALYSIS OF INCOME TRENDS 10, 52–54 (2012), *available at* http://www.cbpp.org/files/11-15-12sfp.pdf.
Next, improve unemployment insurance and raise and index the minimum wage. *Id.* at 10, 49–51.

236. CHUCK MARR & CHYE-CHING HUANG, CTR. ON BUDGET & POLICY PRIORITIES, EARNED INCOME TAX CREDIT PROMOTES WORK, ENCOURAGES CHILDREN'S SUCCESS AT SCHOOL, RESEARCH FINDS 1–2 (2014), *available at* http://www.cbpp.org/files/6-26-12tax.pdf.

strates that the characteristics necessary for a child's success in life are not based on genetics, but on brain chemistry.[237] Children who grow up under chronic stress are less likely to possess strong executive functioning.[238] Executive functioning is a key predictor of a child's ability to succeed in school.[239] Yet, chronic stress is strongly correlated with living in poverty.[240] Thus, it would appear that poor children are destined to repeat the cycle of poverty. Not so.

A fascinating study measuring the effects of environmental stress on children found that their cortisol levels—a hormonal response to stress—spike when they experienced stress.[241] However, a child's cortisol level did not spike when encountering a stressful environment if the parent was attentive and responsive to the child.[242] In other words, parents who can develop nurturing relationships with their children can mitigate the effects of stress associated with living in a harsh environment, and in turn, increase their children's executive functioning and ability to succeed in school.[243]

Thus, neuroscientists don't point to a particular type of family form to ensure a child's chances of success, but rather a particular type of *parent–child* relationship.[244] One study revealed a 77% success rate at predicting whether a child would graduate from high school based on the parental care the child received in his or her early years.[245] As expected, though, developing these parenting skills in a harsh environment is not an easy task. Such programs exist, but demand an investment in resources. Early childhood programs like Head Start, long considered one of the most successful federal government "War on Poverty" programs created, works with parents to support family stability.[246] One forty-year longitudinal study that followed children into adulthood who had attended the Perry Preschool Project in a poverty-stricken neighborhood in Michigan, found that the program led to profound social and economic benefits.[247] The graduates of the preschool program were "more likely to

237. Gary W. Evans & Michelle A. Schamberg, *Childhood Poverty, Chronic Stress, and Adult Working Memory*, 16 PROC. NAT'L ACAD. SCI. U.S. 6545, 6545, 6548 (2009).

238. *Id.* "Executive functioning" refers to the ability of the brain to manage confusing and conflicting information—the type of information that children encounter and must negotiate constantly in school. PAUL TOUGH, HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER 18 (2012).

239. *See* TOUGH, *supra* note 238, at 18.

240. *Id.* at 20.

241. Clancy Blair et al., *Salivary Cortisol Mediates Effects of Poverty and Parenting on Executive Functions in Early Childhood*, 82 CHILD DEV. 1970, 1970, 1979 (2011).

242. *Id.* at 1970, 1978–80.

243. *See id.*

244. *See id.*

245. L. ALAN SROUFE ET AL., THE DEVELOPMENT OF THE PERSON: THE MINNESOTA STUDY OF RISK AND ADAPTATION FROM BIRTH TO ADULTHOOD 210–11 (2005).

246. *See Head Start of Morris County, NJ*, HEAD START COMMUNITY PROGRAM MORRIS COUNTY, INC., http://headstartmc.org/ (last visited Apr. 13, 2014).

247. TOUGH, *supra* note 238, at xix–xx.

graduate from high school, more likely to be employed at age twenty-seven, more likely to be earning more than twenty-five thousand dollars a year at age forty, less likely ever to have been arrested, and less likely to have spent time on welfare" than children who had not attended the program.[248] Recall that education and income were significant predictors of family stability.[249] Thus, the cycle of family instability that seems to plague poor families is not inevitable.

We do not need to reinvent the wheel. It can seem overwhelming and hopeless to believe that any kind of meaningful redistribution of resources is likely to occur. In fact, it may appear naïve to believe that even modest increased funding for social support networks is possible in our current economic climate. Yet, research shows that this kind of resource investment actually yields tangible returns.[250] Heckman analyzed the Perry Preschool Project and found that for every dollar invested in the program, a yield of seven to twelve dollars found its way into the economy.[251] These children developed non-cognitive skills like curiosity, social fluidity, and social control that served them well throughout life.[252] These are the same skills mirrored in affluent family structures, which contribute to a child's success in life.[253] Institutional support at the macro level, though, will not succeed alone in creating family stability. At the micro level, a cultural shift in individual interactions must occur—the focus of the next section.

2. Renewing the Cultural Value of Respect

The second element that must be the focus of attention if the family, in whatever form, is to experience stability is the resurgence of the cultural value of respect. The desire for a marginalized group to speak out and ask for the same rights and access to resources should not be met with condemnation or scapegoating.[254] But even more pragmatically, we should interact with our political, religious, and socioeconomic plurali-

248. *Id.* at xx.
249. *See supra* Part I.D.
250. TOUGH, *supra* note 238, at 196.
251. *Id.*
252. *Id.* at xx.
253. *See id.* at 76.
254. Something very wrong is present in a culture in which the media pays an individual to write or declare contemptuous things about others—especially those with less social power. For example, after observing the speeches of the first night of the Democratic National Convention, in which Michelle Obama, Lilly Ledbetter, and Tammy Buckworth spoke, CNN commentator Erick Erickson tweeted, "First night of the Vagina Monologues . . . going as expected." *CNN: Fire Erick Erickson*, ULTRA VIOLET, http://act.weareultraviolet.org/sign/erickson/?source=so%3E (last visited Apr. 13, 2014) (quoting Erick Erickson, TWITTER (Sept. 4, 2012, 5:31 PM), https://twitter.com/EWErickson/status/243144183529996288) (internal quotation marks omitted). Such comments can be viewed as nothing more than contempt. When Sandra Fluke spoke up demanding access to birth control in the new health care law, Rush Limbaugh called her a slut. Jack Mirkinson, *Rush Limbaugh: Sandra Fluke, Woman Denied Right to Speak at Contraception Hearing, a 'Slut,'* HUFFINGTON POST (Feb. 29, 2012, 9:26 PM), http://www.huffingtonpost.com/2012/02/29/rush-limbaugh-sandra-fluke-slut_n_1311640.html.

ties with respect. As Harvard political philosopher Michael Sandel observed, "a better way to mutual respect is to engage directly with the moral convictions citizens bring to public life, rather than to require that people leave their deepest moral convictions outside politics before they enter."[255] Indeed, we should interact with children and parents with respect because structural reform is not enough. Interpersonal behaviors matter too.

Research reveals that the concept of respect, more so than any other traditional measure of relationship success, determines relationship satisfaction—more so than love, likeability, personality, or attachment.[256] In Frei and Shaver's study, the results showed that, regardless of whether respondents were considering what respect means for the general public or for a romantic partner, five key concepts emerged.[257] Respect was associated with a person who had good morals, was considerate, listened, was honest, and was accepting of other viewpoints.[258] Moreover, the researchers observed that the practice of respect actually engendered more respect.[259] Other research by Sara Lawrence-Lightfoot demonstrated that respect brought reciprocal benefits.[260] Based on her research results, she encouraged a reformulation of the concept of respect not as something accorded to someone in power, but rather grounded in empathy and connectedness in a place of equality—regardless of each party's social or economic status.[261] All the researchers agreed that respect was the opposite of contempt.[262]

Reinvigorating the concept of respect may better serve us in moving towards a policy that supports social structures that will promote family stability. However, respect must operate at both the individual and group level in order for the necessary individual and social structural pieces to successfully coalesce. As Coontz observed, "The problem is not to berate people for abandoning past family values, nor to exhort them to adopt better values in the future—the problem is to build the institutions and social support networks that allow people to act on their best values rather than on their worst ones."[263]

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255. Michael Sandel, Anne T. & Robert M. Bass Professor of Gov't, Harvard Univ., Talk presented at official TED Conference: The Lost Art of Democratic Debate (Feb. 2010), *available at* http://www.ted.com/talks/michael_sandel_the_lost_art_of_democratic_debate.html.

256. Jennifer R. Frei & Phillip R. Shaver, *Respect in Close Relationships: Prototype Definition, Self-Report Assessment, and Initial Correlates*, 9 PERS. RELATIONSHIPS 121, 135 (2002).

257. *Id.* at 125.

258. *Id.* at 125, 128.

259. *Id.* at 122, 128.

260. SARA LAWRENCE-LIGHTFOOT, RESPECT: AN EXPLORATION 9–10 (2000).

261. *Id.*

262. Frei & Shaver, *supra* note 256, at 121–22.

263. COONTZ, *supra* note 179, at 22.

CONCLUSION

This Article has explored the extent to which state DOMAs are associated with their intended objective of increasing family stability. The goal of the Article is to move the discourse and political-legal analysis beyond whether DOMAs can promote family stability (they do not) to considering means for achieving family stability for *all* family types within a broad moral framework in a post-DOMA America. It may be that those in power seek to maintain their power through the use of moral panics, but the discourse of same-sex marriage as a threat to "traditional families" seems off the mark. It is a distraction. After all, polls now show that from 1988 to 2010, the gap between support of or opposition to gay marriage has narrowed rapidly and significantly;[264] but the gap between well-to-do versus hard-off and family stability and family volatility has widened considerably.[265] Other industrial countries have managed to welcome other family forms—including same-sex marriage—and yet maintain family stability through the use of child-centered economic and social policies.[266] Our goal should be to develop a policy that lets families thrive.[267] Marriage should not be a social objective in and of itself, conceived from a singular hetero-normative notion. Rather, marriage should be one possible outcome of many from within an evolving family and child-oriented policy.[268]

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264. Nate Silver, *Opinion on Same-Sex Marriage Appears to Shift at Accelerated Pace*, FIVETHIRTYEIGHTPOLITICS (Aug. 12, 2010, 12:44 PM), http://www.fivethirtyeight.com/2010/08/opinion-on-same-sex-marriage-appears-to.html. In fact, 51% of Americans are now in favor of same-sex marriage, and 72% believe that it is inevitable that it will become the law of the land. PEW RESEARCH CTR., IN GAY MARRIAGE DEBATE, BOTH SUPPORTERS AND OPPONENTS SEE LEGAL RECOGNITION AS 'INEVITABLE' 1 (2013), *available at* http://www.people-press.org/files/legacy-pdf/06-06-13%20LGBT%20General%20Public%20Release.pdf.

265. STIGLITZ, *supra* note 196, at 19; *see supra* Part I.B.1.

266. Sixty percent of Norwegian families are married couples with children, despite allowing for same-sex marriage. Fifty-five percent of Finnish families include married couples with children, despite allowing for same-sex marriage. Sixty-three percent of Canadian families have married parents with children, despite allowing for same-sex marriage. Seventy-eight percent of families in the Netherlands comprise of married parents with children, despite allowing for same-sex marriage. Fifty-one percent of Icelandic families contain married parents with children, despite allowing for same-sex marriage. Various family structures thrive and do not threaten "traditional" family models because these countries have far more generous economic and social policies devoted to children.

267. *See generally* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 10 (2008); Clare Huntington, Flourishing Families: Harnessing Law to Foster Strong, Stable, Positive Relationships (unpublished manuscript), *available at* http://www.law.ubalt.edu/centers/caf/pdf/Huntington.pdf.

268. The *Windsor* decision moves us one small step closer in that direction. *See* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013).

APPENDIX A

MARRIAGE CALCULATED SLOPES FOR EACH STATE

State	Pre	Post
AK		
AL	-0.190	-0.240
AR	-0.371	-0.486
AZ	-0.201	0.300
CA	0.033	0.000
CO	-0.143	-0.080
CT	0.011	0.060
DC	-0.286	0.770
DE	-0.132	-0.170
FL	-0.085	-0.200
GA	-0.190	-0.139
HI	0.625	-1.220
IA	-0.075	
ID	-0.200	-0.420
IL	-0.193	-0.140
IN	-0.164	-0.050
KS	-0.146	-0.120
KY	-0.360	-0.251
LA		
MA	0.029	-0.090
MD	-0.111	-0.250
ME	-0.064	-0.170
MI	-0.126	-0.131
MN	-0.154	-0.190
MO	-0.200	-0.109
MS	-0.306	-0.214
MT	0.006	-0.006
NC	-0.193	-0.180
ND	0.043	-0.071
NE		
NH	-0.179	-0.040
NJ	-0.050	-0.120
NM	-0.218	0.120
NV	-4.730	-4.012

NY	-0.104	-0.110
OH	-0.271	-0.146
OK		0.039
OR	0.026	-0.183
PA	-0.036	-0.120
RI	-0.057	-0.210
SC	-0.401	-0.150
SD	-0.174	-0.190
TN	-0.705	-0.490
TX	-0.275	-0.130
UT	-0.003	-0.271
VA	-0.173	-0.240
VT	-0.164	0.160
WA	-0.121	-0.140
WI	-0.106	-0.150
WV	-0.111	-0.180
WY	-0.139	-0.440

APPENDIX B

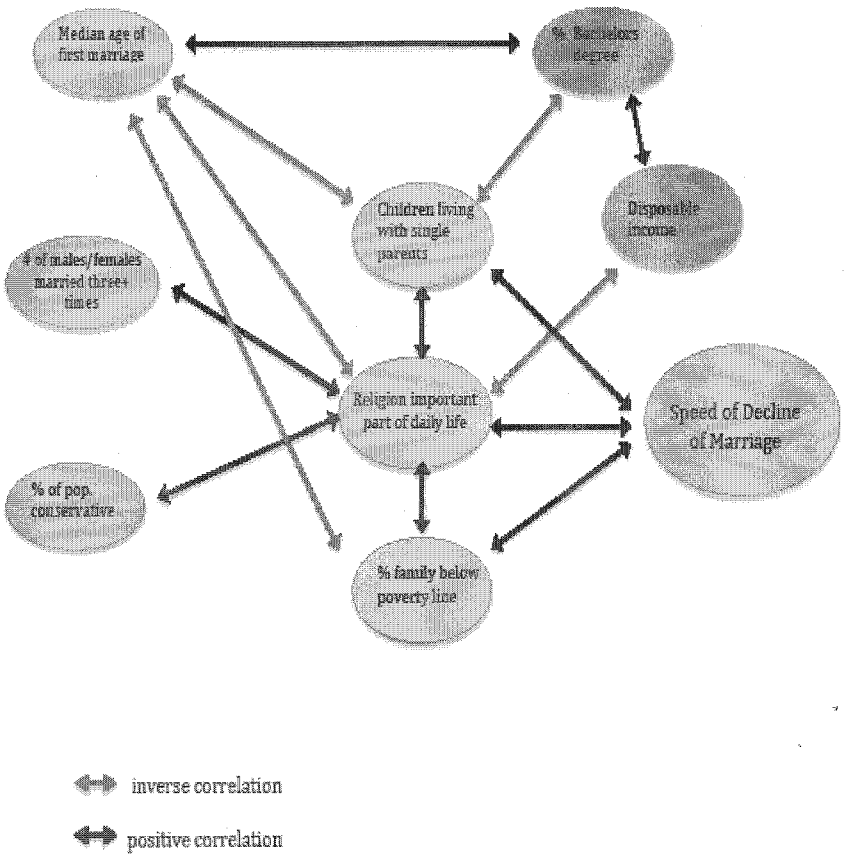
DIVORCE SLOPES CALCULATED FOR EACH STATE

State	Pre	Post
AK		
AL	-0.123	-0.020
AR	-0.049	-0.063
AZ	-0.081	-0.100
CA		
CO	-0.071	-0.050
CT	-0.014	-0.060
DC	-0.304	0.240
DE	-0.089	-0.070
FL	-0.091	0.200
GA	-0.260	
HI	-0.020	
IA	-0.096	
ID	-0.075	0.110
IL	-0.132	0.010
IN		
KS	-0.057	0.140
KY	-0.091	-0.049
LA		
MA	-0.050	0.030
MD	-0.011	-0.050
ME	-0.168	-0.010
MI	-0.080	-0.003
MN	-0.077	
MO	-0.143	0.040
MS	-0.109	-0.080
MT	0.111	-0.117
NC	-0.089	-0.060
ND	-0.229	0.011
NE		
NH	-0.196	-0.070
NJ	-0.018	-0.030
NM	-0.025	-0.090
NV	-0.750	-0.128

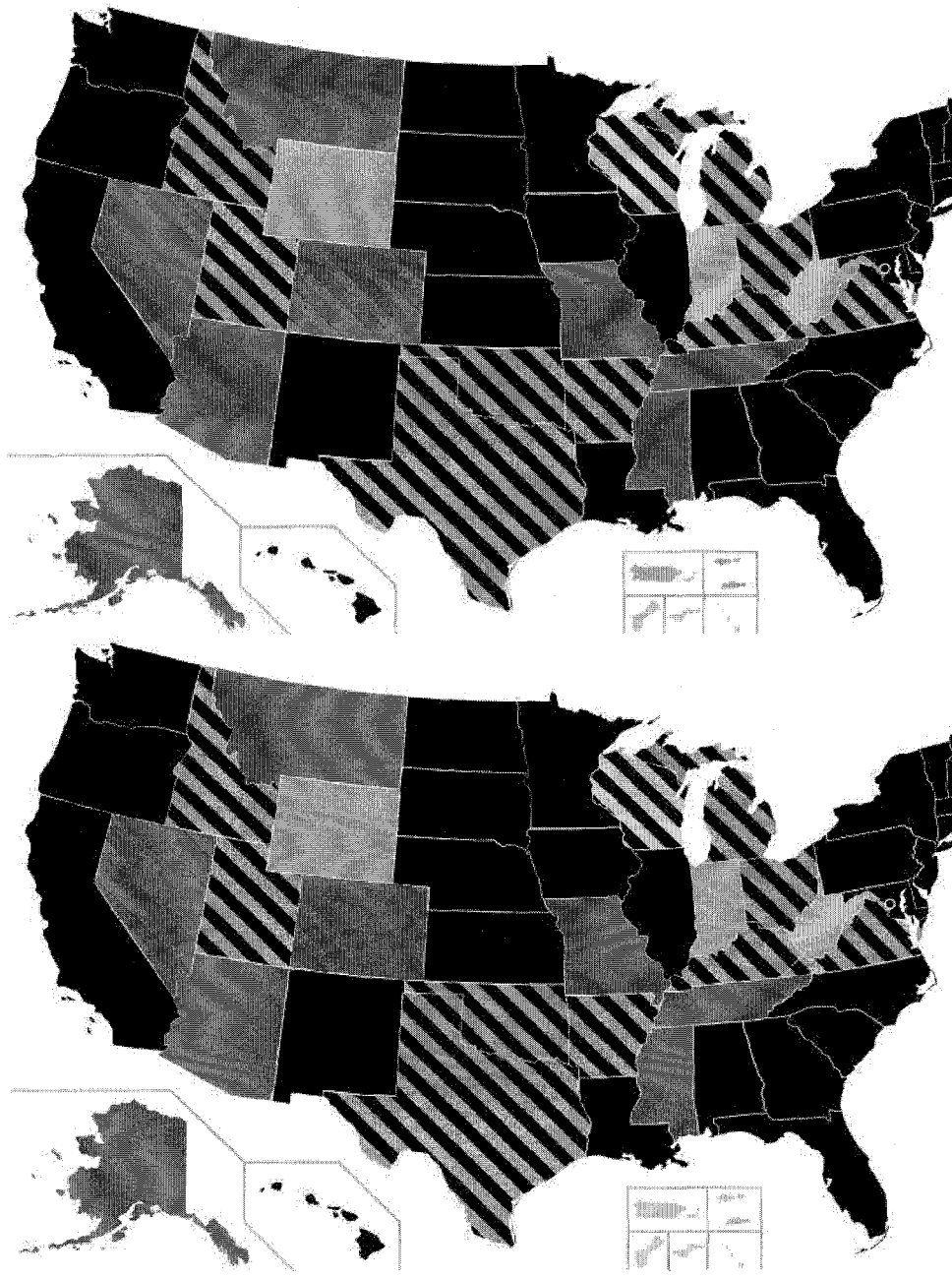
NY	-0.054	-0.070
OH	-0.086	-0.034
OK		-0.025
OR	-0.120	-0.037
PA	-0.093	-0.030
RI	0.043	0.060
SC	-0.144	0.050
SD	-0.094	0.110
TN	-0.189	-0.060
TX	-0.089	-0.020
UT	-0.014	-0.071
VA	-0.064	-0.010
VT	-0.111	-0.010
WA	-0.100	0.010
WI	-0.043	0.020
WV	0.014	0.020
WY	-0.111	0.020

APPENDIX C

Fig. 1 Model of Variables Correlated Directly and Indirectly with Declining Marriage



APPENDIX D



APPENDIX E

	Amendment	Statutory	Civil Unions	Domestic Partnership	Same-Sex
AK	1996	1996			
AL	2006	1998			
AR	2004	2005			
AZ	2008	1996			
CA	2008	2000		2007	
CO	2006	2006	2013	2009	
CT					2009
DC					2010
DE		~~2009~~	2011		2013
FL	2008	1997			
GA	2004	1996			
HI	1998		2012		
IA					2009
ID	2006	1996			
IL		2006	2011		
IN		1997			
KS	2005				
KY	2004	1998			
LA	2004	1999			
MA					2003
MD		~~2006~~			2012
ME		~~1997~~		2004	2012
MI	2004	1996			
MN		1997			
MO	2004	2001			
MS	2004				
MT	2004	1997			
NC	2012	1996			
ND	2004	1997			

NE	2000				
NH					2010
NJ			2007		
NM					Other Jdx
NV	~~2002~~			2009	2011
NY					
OH	2004	2004			
OK	2004	1997			
OR	2004			2011	
PA		1996			
RI			2011		2013
SC	2006	1996			
SD	2006	2000			
TN	2006	1996			
TX	2005	2003			
UT	2004	2004			
VA	2006	2004			
VT			2000		2009
WA		~~1998~~		2009	2012
WI	2007	2009		2013	
WV		2001			
WY		1977			

BABY WITHOUT A COUNTRY: DETERMINING CITIZENSHIP FOR ASSISTED REPRODUCTION CHILDREN BORN OVERSEAS

KRISTINE S. KNAPLUND†

ABSTRACT

The United States has long followed the English common law view that citizenship can be attained at birth in two ways: by being born in the U.S. (*jus soli*) or by being born abroad as the child of a U.S. citizen (*jus sanguinis*). For a child born abroad to claim citizenship through *jus sanguinis*, the State Department for many years required proof of a blood relationship between the child and a U.S. citizen. While a genetic test serves this purpose for children conceived coitally, advances in assisted reproduction techniques (ART) that have separated the two functions of a birth mother—namely gestation and genetics—have greatly complicated the definition of parentage. In modern times this has led to unjust results, including the recent denial of U.S. citizenship to children born to American mothers who used donated eggs to conceive and give birth abroad. While the State Department has recently modified its regulations to allow the woman giving birth to claim maternity despite the lack of a genetic tie, in many cases it continues to use a parentage standard that dates back to 1952, when assisted reproduction techniques such as *in vitro* fertilization or the use of donated gametes had not yet been developed. This Article seeks to propose a workable solution to the question of citizenship for children born overseas to American parents via ART. It first explores the origins of *jus sanguinis* in Roman and English common law along with ancient and medieval views of conception and maternity, and examines three prevailing methods to determine parentage: the parturient test, genetic test, and parental intent test. Ultimately the Article recommends that the State Department acknowledge advances in ART, and the different ways children are nowadays conceived, by altering its *jus sanguinis* policy to allow several presumptions of parentage to apply.

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INTRODUCTION

The United States has long followed the English common law view that citizenship can be attained at birth in two ways: by being born in the United States (*jus soli*) or by being born abroad as the child of a U.S. citizen (*jus sanguinis*). The first, *jus soli*, is now part of the Fourteenth Amendment to the U.S. Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1] *Jus soli* theoretically does not inquire into the citizenship of the child's parents; the relevant fact is that the birth takes place in the United States.[2] *Jus sanguinis*, in contrast, arises from the parent–child relationship. The State Department translates *jus sanguinis* as "the law of the bloodline," citing it as a traditional "concept of Roman or civil law."[3] By "natural parent," the State Department usually means a blood relationship with a U.S. citizen: "It is not enough that the child is presumed to be the issue of the parents' marriage by the laws of the jurisdiction where the child was born."[4]

Jus sanguinis, involving proof of a blood relationship to one's child, works well for children conceived the old fashioned way, through coitus—a blood test or DNA test will easily confirm the parentage of the child in the vast majority of cases. But the matter is far more complicated for those who have used donated sperm or ova to achieve a pregnancy;

1. U.S. CONST. amend. XIV, § 1.

2. Despite the language of the Fourteenth Amendment, Native Americans were not accorded birthright citizenship until 1924, on the theory that the Indian tribes were an independent sovereign and therefore not subject to the jurisdiction of the United States. John Rockwell Snowden et al., *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 NEB. L. REV. 171, 182–83 (2001).

3. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 7 FAM § 1111.a(2) (2012), *available at* http://www.state.gov/documents/organization/86755.pdf. The American Philosophical Society's *Encyclopedic Dictionary of Roman Law* defines *jus (ius) sanguinis* as "[t]he rights of blood (blood ties = [cognatio]). They 'cannot be destroyed by any civil law.'" 43 ADOLF BERGER, AM. PHILOSOPHICAL SOC'Y, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW pt. 2, at 533 (1953). *Cognatio* is defined as "[b]lood relationship." *Id.* at 393.

4. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 7 FAM § 1131.4-1.a (2010).

the man who intends to be the child's father, or the woman who will act as the child's mother, may lack a blood relationship to the child. In such a case, when donated gametes (sperm or ova) are used, the State Department always considers the child to be born out of wedlock, even if the intended parents are married, and until a recent change in the website, required proof of the blood or genetic relationship by clear and convincing evidence.[5]

A purely genetic connection to the child is sufficient to establish parentage in relatively few instances in American law. One is child support: even if the genetic father has had no contact with the child, and has done nothing to establish a relationship (or has even been prevented from knowing about the child), the genetic connection may be enough if no other presumed father is on the scene.[6] As Theresa Glennon notes, "The child support system for children born out of wedlock is based on the assumption that biological fatherhood is a sufficient basis for legal and financial responsibility for a child."[7] The rationale is that, once a man has engaged in a sexual relationship, he has a responsibility to provide for any children born out of that encounter.[8]

This Article explores a second instance in which the genetic connection is paramount: when an American citizen gives birth abroad. Over 7 million Americans live abroad, and more than 65 million travel abroad annually.[9] Some Americans are venturing abroad specifically for infertility treatments because of lower costs at foreign clinics and the willingness of clinics to treat older patients.[10] The result: in Fiscal Year 2012, the State Department "registered 64,991 overseas births to U.S. parents."[11] However, citizenship has recently been denied to the children of two American women who used anonymously donated gametes to con-

5. *See id.* § 1133.4-2; Scott Titshaw, *Sorry Ma'am, Your Baby Is an Alien: Outdated Immigration Rules and Assisted Reproductive Technology*, 12 FLA. COASTAL L. REV. 47, 122, 129–30 (2010) (illustrating the State Department's genetic essentialist approach to determining the citizenship of children conceived through assisted reproductive technology). The State Department recently changed its website to state that "a U.S. citizen mother must be either the genetic or the gestational and legal mother of the child at the time and place of the child's birth." U.S. Dep't of State, *Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad*, TRAVEL.STATE.GOV, http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/assisted-reproductive-technology.html (last visited May 15, 2014).

6. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 558 (2000).

7. *Id.*

8. *Id.*

9. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, WHO WE ARE AND WHAT WE DO: CONSULAR AFFAIRS BY THE NUMBERS (Jan. 2013), *available at* http://travel.state.gov/pdf/ca_fact_sheet.pdf.

10. Heather Won Tesoriero, *Infertile Couples Head Overseas for Treatments—Clinics in Thailand, Canada, Israel Tout Cheaper In-Vitro; Checking up on Success Rates*, WALL ST. J., Feb. 19, 2008, at D1; M. Susan Wilson, *U.S. Women Crossing Globe for Fertility Help*, NBC NEWS.COM, http://www.nbcnews.com/id/19100571/ns/health-pregnancy/t/us-women-crossing-globe-fertility-help (last updated June 13, 2007, 09:47 EST).

11. BUREAU OF CONSULAR AFFAIRS, *supra* note 9.

ceive and give birth to a child: one in Israel[12] and one in Switzerland;[13] in a third case, the U.S. Embassy refused to recognize the birth mother as the child's mother because she had used donated eggs and given birth to the child in India.[14] At least in these cases each woman knew that the child to whom she had given birth was not genetically linked to her. The State Department warns travelers:

> The Department is aware of cases of foreign fertility clinics that have substituted alternate donor sperm and eggs when the U.S. parents' genetic material turned out not to be viable. The undisclosed switch was revealed when the Post requested DNA tests as part of the process of documenting the child's citizenship for the purposes of issuing a passport. Such situations can have the unfortunate consequence of leaving children stateless.[15]

Part I of this Article discusses the origins of *jus sanguinis* in Roman and English common law, including ancient and medieval views of conception and maternity in determining the child's bloodline. Not surprisingly, these views differ significantly from those held today. Taking into account this scientific background, Part II discusses citizenship laws in early U.S. history and assumptions about who were the parents of a child, both in wedlock and out of wedlock. While the definition of paternity has always taken note of biology as well as a man's relationship to the birth mother, science began to play a more prominent role in the legal definition of parenthood once blood grouping and blood tests were available starting in the early 1900s. Part III then introduces the law of U.S. citizenship today, which in its main outlines is the same as first codified in 1952. The ability of DNA testing to positively identify the father in most cases, plus advances in assisted reproductive technology (ART) that separate the two functions of the birth mother—genetics and gestation—have greatly complicated the definition of parentage for children, but the State Department has, in large part, continued to use the same parentage

12. Sarah Elizabeth Richards, *Mother Country: The Perils of Getting an Assist Abroad on Having a Baby—for Americans and Foreigners Both*, SLATE (Mar. 27, 2012, 4:02 PM), http://www.slate.com/articles/double_x/doublex/2012/03/fertility_tourism_the_perils_of_having_a_baby_abroad_with_assisted_reproduction_technology_.html.

13. Conversation with Congressman Eliot L. Engel of New York, U.S. House of Representatives (Aug. 2, 2012) (notes on file with author) (discussing how Congressman Engel's office successfully helped the constituent gain citizenship for her child in January 2013, just before the child's first birthday); Letter from Congressman Eliot L. Engel of New York, U.S. House of Representatives, to Hillary Clinton, Sec'y of State (July 10, 2012) (on file with author); E-mail from Brian Skretny, Legislative Dir., Office of Congressman Eliot Engel, to author (Jan. 25, 2013, 10:18 AM) (on file with author) (stating that child was granted citizenship prior to first birthday).

14. Jaya Menon, *In the Womb of Controversy*, TIMES INDIA (Jan. 25, 2010, 04:59 IST), http://articles.timesofindia.indiatimes.com/2010-01-25/chennai/28133900_1_egg-donation-consulate-donor-eggs. In such a case, where only the egg and not the sperm has been donated, the child may be able to obtain U.S. citizenship at birth if the father is a U.S. citizen. *Id.*

15. U.S. Dep't of State, *supra* note 5. The child born in Switzerland, for example, was officially stateless at birth because Switzerland does not recognize *jus soli*. Conversation with Congressman Eliot L. Engel of New York, U.S. House of Representatives (Aug. 2, 2012) (notes on file with author).

standard first detailed in 1952. Part IV examines and critiques three methods of identifying parentage to determine which should be used for children born abroad: the State Department's preferred method (genetics), the common law parturient test (the woman who gives birth is the mother), and the recently developed intent test (those who intend to raise the child are the parents). In Part V, the Article concludes that our citizenship rules for children born abroad must acknowledge the different ways in which children are conceived and develop definitions of parentage that will avoid the unjust results noted in this Article.

I. WHERE DO BABIES COME FROM?

A. Greek and Roman Views of Parentage

The ancient Greeks and Romans shared two competing views on the mother's role in creating a child but generally agreed that, whatever her contribution, it was less important than the man's.[16] Most Greeks and Romans followed the teachings of Aristotle,[17] who articulated the "one seed" theory in which the man provides the "movement and definition"[18] while the woman provides the nutriment.[19] Contributions by both male and female were necessary, in Aristotle's view, but "birth must take place in the female" because she "contains the matter out of which the product is fashioned."[20] While Aristotle acknowledged that women could become pregnant without experiencing orgasm, more often "the opposite is the case" since the orgasm provided a means to draw the semen into the uterus.[21] A second view among a minority of Greeks and Romans was based on Hippocrates, who propounded the "two-seed" theory.[22] In

16. *See* Nancy Tuana, *The Weaker Seed: The Sexist Bias of Reproductive Theory*, 3 HYPATIA 35, 41 (1988) ("Although such theorists [including Anaxagoras, Empedocles, Hippocrates, and Parmenides] gave woman a role in the creation of the form as well as the material of the fetus, they uniformly held that woman's contribution was weaker than that of man.").

17. VERN L. BULLOUGH, SCIENCE IN THE BEDROOM: A HISTORY OF SEX RESEARCH 12–13 (1994). Aristotle lived from 384 to 322 B.C. *Aristotle (384–322 B.C.E.)*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/aristotl/ (last visited Mar. 25, 2014).

18. ARISTOTLE, ARISTOTLE DE PARTIBUS ANIMALIUM I AND DE GENERATIONE ANIMALIUM I 51, 54 (D. M. Balme trans., Oxford Univ. Press 1992).

19. *Id.* at 50.

20. *Id.* at 54.

21. THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 48 (1990) (quoting ARISTOTLE, ON THE GENERATION OF ANIMALS bk. 2 ch. 4 § 739a[20]–[35]). Others wrote that orgasm was a sign of conception: the physician to Justinian believed that women who were raped were sterile, "while those 'in love conceive very often.'" *Id.* at 49 (quoting AETIOS OF AMIDA: THE GYNAECOLOGY AND OBSTETRICS OF THE VI CENTURY, A.D. 36 (James V. Ricci trans., 1950)). That debate has resurfaced today with the remarks of Representative Todd Akin that rape rarely results in pregnancy because "[i]f it's a legitimate rape, the female body has ways to try to shut the whole thing down." Lori Moore, *The Statement and the Reaction*, N.Y. TIMES, Aug. 21, 2012, at A13 (internal quotation mark omitted).

22. BULLOUGH, *supra* note 17, at 12–13; *see also* Yii-Jan Singh, *Semen, Philosophy, and Paul*, 4 J. PHIL. & SCRIPTURE 32, 35 n.14 (2007), *available at* http://www.philosophyandscripture.org/Issue4-2/Singh.pdf (referencing the two-seed theory). Hippocrates lived from 450 to 380 B.C. Michael Boylan, *Hippocrates (c.450–c.380 B.C.E.)*, INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/hippocra/ (last visited Mar. 25, 2014). Galen lived from 130 to 200 C.E. and "was one of the most prominent ancient physicians." Michael Boylan,

Hippocrates' view, both the man and the woman produced sperm which then mixed together to create a child

> just as though one were to mix together beeswax and suet, using a larger quantity of the suet than of the beeswax, and melt them together over a fire. While the mixture is still fluid, the prevailing character of the mixture is not apparent: only after it solidifies can it be seen that the suet prevails quantitatively over the wax. And it is just the same with the male and female forms of the sperm.[23]

As early as the sixth century, Justinian's *Corpus Juris Civilis* asserted that "the mother is certain" (*mater semper certa est*);[24] the issue was identifying the father. Roman law allowed the husband to dispute paternity of a child borne by his wife, but in a limited way: Once the wife gave notice to her husband that she was pregnant, his role was "then either to send guards or to give notice to her that she is not pregnant by him . . . . [U]nless he sends guards or replies giving her notice she is not pregnant by him, the husband is compelled to acknowledge the offspring."[25] The guards were "[p]robably . . . meant to prevent a changeling child from being passed off as the" husband's child.[26] Thus, in some cases in ancient Rome, a child might lack a blood relationship to a man designated as his father because he was married to the woman who gave birth.

B. Parentage Under English Common Law: Laying the Groundwork for the United States

As with the Romans and the Greeks, English common law emphasized the role of the male in conception. St. Thomas Aquinas[27] supported the Aristotelian view that man's seed provided the form, while the wom-

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Galen (130–200 C.E.), INTERNET ENCYCLOPEDIA PHIL., http://www.iep.utm.edu/galen/ (last visited Mar. 25, 2014).

23. LAQUEUR, *supra* note 21, at 39 (quoting HIPPOCRATES & IAIN M. LONIE, THE HIPPOCRATIC TREATISES "ON GENERATION," "ON THE NATURE OF THE CHILD," "DISEASES IV": A COMMENTARY 3–4 (1981)).

24. Cindy L. Baldassi, Mater Est Quam Gestatio Demonstrat: A Cautionary Tale 3 (June 27, 2007) (unnumbered working paper, Univ. of B.C. Faculty of Law Working Papers Series) (quoting GEORGE BLAXLAND, CODEX LEGUM ANGLICANARUM: OR, A DIGEST OF PRINCIPLES OF ENGLISH LAW, ARRANGED IN THE ORDER OF THE CODE NAPOLEON 292 (1903)) (citing 1 THE DIGEST OF JUSTINIAN 44 (Alan Watson ed., 1985)), *available at* http://ssrn.com/abstract=927147. Justinian, born in 482 A.D., reigned from 527 to 565. Sarah Brooks, *The Byzantine State Under Justinian I (Justinian the Great)*, METROPOLITAN MUSEUM ART, http://www.metmuseum.org/toah/hd/just/hd_just.htm (last updated Apr. 2009).

25. BRUCE W. FRIER & THOMAS A.J. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW 105 (2004).

26. *Id.*

27. St. Thomas was born in 1225 and died in 1274 A.D. Ralph McInerny & John O'Callaghan, *Saint Thomas Aquinas*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/aquinas/ (last updated Sept. 30, 2009); *Thomas Aquinas (1225–1274)*, INTERNET ENCYCLOPEDIA PHIL. (May 6, 2009), http://www.iep.utm.edu/aquinas/.

an supplied the "corporeal matter."[28] In the seventeenth century, the two-seed theory re-emerged in midwife manuals. While most still believed that the woman's role in creating the child was solely passive, Nicholas Culpeper[29] revived interest in Hippocrates' two-seed theory by propounding the "radical" idea that the woman contributed with an egg.[30] In Culpeper's view, "the woman spends her seed as well as the man, and both are united to make conception."[31] Another English writer at the time, Jane Sharp, likewise believed that the woman released her seed in orgasm, uniting with the male seed to become pregnant.[32] Later in the seventeenth century a new theory emerged: the preformation doctrine, which held that the embryo contained a complete miniature person who was nourished in the uterus in order to grow.[33] Debate ensued over whether this miniature person was contained in man's semen (animalculism) or woman's egg (ovism).[34] In the 1670s Leeuwenhoek[35] sided with animalculism by using a crude microscope to observe that semen contained millions of animalcules,[36] which he termed spermatozoa.[37] "Echoing centuries of tradition, Leeuwenhoek insisted that the nourishment of the masculine seed was the sole function of the female."[38] In 1694 Hartsoeker published a drawing of a drop of sperm containing a tiny person, representing what he believed was contained in the semen.[39]

28. Tuana, *supra* note 16, at 46 (quoting THOMAS AQUINAS, SUMMA THEOLOGICA I:98:2 (Fathers of the English Dominican Provinces trans., 1947)) (internal quotation mark omitted).

29. Nicholas Culpeper, an English physician (1616–1654), published his *A Directory for Midwives* in 1651 to revive the two-seed theory. *See* Dylan Warren Davis, *Nicholas Culpeper: Herbalist of the People*, SKYSCRIPT.CO.UK (Jan. 2005), http://www.skyscript.co.uk/culpeper.html.

30. Olav Thulesius, *Nicholas Culpeper, Father of English Midwifery*, 87 J. ROYAL SOC'Y MED. 552, 554 (1994).

31. *Id.*

32. Elaine Hobby, *"Secrets of the Female Sex": Jane Sharp, the Reproductive Female Body, and Early Modern Midwifery Manuals*, 8 WOMEN'S WRITING 201, 202–03 (2001). Jane Sharp, a midwife for over thirty years, was one of the first women to publish a book on her profession: *The Midwives Book: Or, the Whole Art of Midwifry Discovered* was published in 1671. *Id.* at 201, 209.

33. Ava Chamberlain, *The Immaculate Ovum: Jonathan Edwards and the Construction of the Female Body*, 57 WM. & MARY Q. 289, 298 (2000).

34. *Id.* at 298–99.

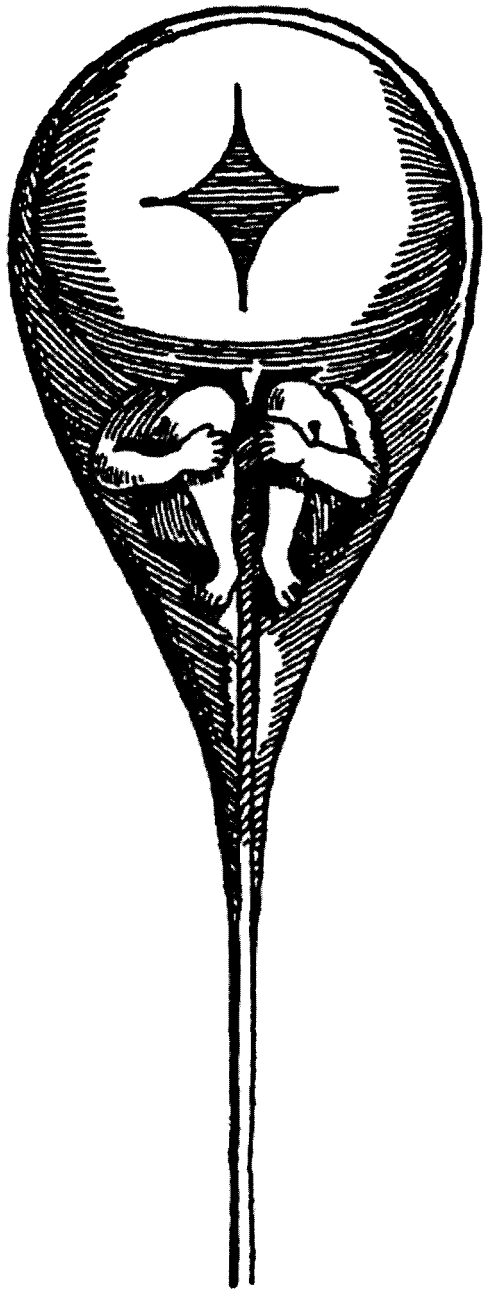
35. Antony van Leeuwenhoek was a fabric maker who built his own microscopes to be the first to observe bacteria and other organisms. *Antony van Leeuwenhoek (1632–1723)*, U. CAL. MUSEUM PALEONTOLOGY, www.ucmp.berkeley.edu/history/leeuwenhoek.html (last visited Mar. 26, 2014).

36. LAQUEUR, *supra* note 21, at 171.

37. BULLOUGH, *supra* note 17, at 15.

38. Tuana, *supra* note 16, at 53.

39. *Id.* at 54. Nicolaas Hartsoeker (1656–1725) published the pencil sketch in *Essai de Dioptrique* in 1694. Cera R. Lawrence, *Nicolaas Hartsoeker*, EMBRYO PROJECT ENCYCLOPEDIA, http://embryo.asu.edu/pages/nicolaas-hartsoeker (last modified Sept. 25, 2013).



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40. Tuana, *supra* note 16, at 54.

A century later, Erasmus Darwin (grandfather of Charles Darwin)[41] stated that the man supplied the form of the embryo, while the woman provided the oxygen and the food.[42] Astute observers wondered why some children strongly resembled their mothers, if in fact only the father provided the blueprint, but science had an answer for that as well: a concave impression that resembles the woman is in the "little nich[e] of the ova of women," creating a mold to form the face of the child.[43]

As the science developed on conception and parentage, England had several ways to determine citizenship at birth. As early as 1351, a statute allowed children born abroad to English parents to be considered natural-born English subjects, adhering to the principle of *jus sanguinis*.[44] After King James VI of Scotland became King James I of England in 1603, the question arose whether children born in Scotland after the "union of the crowns" were English citizens.[45] The decision in *Calvin's Case* in 1608 by the King's Bench, Common Pleas justices, the Lord Chancellor, and the barons of the Exchequer—fourteen judges in all—was that they were, thus confirming *jus soli* in English law.[46] Those born in Scotland before 1603, such as Calvin's parents, were still Scottish subjects, not English.[47] Thus, *Calvin's Case* expressed the common law view that the place of birth, regardless of one's blood, could be a factor in determining citizenship. As Sir Edward Coke, Chief Justice of the Common Pleas, held,

> Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of—therefore, according to our common law, owes allegiance to—the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.[48]

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41. *Erasmus Darwin (1731–1802)*, U. CAL. MUSEUM PALEONTOLOGY, www.ucmp.berkeley.edu/history/Edarwin.html (last visited Mar. 26, 2014). His book, *Zoonomia, or, The Laws of Organic Life* (1794–1796), suggested a theory of evolution that his grandson later fully developed. *Id.*

42. Tuana, *supra* note 16, at 55.

43. *Id.* at 56 (quoting 3 JEAN ASTRUC, A TREATISE ON THE DISEASES OF WOMEN 47–48 (1762)).

44. Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73, 83 (1997) (citing De Natis Ultra Mare, 1350, 25 Edw. 3, c. 2 (Eng.)).

45. *Id.* at 80.

46. *Id.* at 80–83.

47. *Id.* at 82–83.

48. *Id.* (quoting HERBERT BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW, AND EXEMPLIFIED BY CASES 31 (George L. Denman, 2d ed. 1885). The United Kingdom continued to recognize *jus soli* until 1981. *See* Naturalization Act, 1870, 33 & 34 Vict., c. 14, § 4 (Eng.); British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 4 (Eng.). The British Nationality Act of 1981 changed the law by requiring that one of the child's parents be a British citizen even though the child was born on British soil. British Nationality Act, 1981, c. 61, §§ 1, 3 (Eng.).

II. U.S. CITIZENSHIP AND SCIENCE, 1790 TO THE 1950S

When the Unites States was first formed, the definition of citizenship was left to the individual states.[49] Thomas Jefferson, then-Governor of Virginia, crafted a statute enacted by his state in 1779 determining that "all white persons born within the territory of this commonwealth" would be citizens.[50] In 1787, the U.S. Constitution granted Congress the authority "[t]o establish an uniform Rule of Naturalization,"[51] which was exercised by the first Congress at its Second Session in 1790.[52] The 1790 Act, in addition to allowing "any alien" who was "a free white person" to apply for citizenship after residing here for two years, provided:

> [T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . .[53]

In 1795, the 1790 Act was repealed and replaced by a similar provision to provide citizenship for children born abroad.[54] At that time, when Congress first considered citizenship for those born abroad, it was not possible for the birth mother to be anything other than the genetic mother of the child. Whatever her role—whether she contributed some of the seed for the child or merely nourished and housed a preformed child—she was the mother because she had given birth. The "ancient" Latin maxim translated as "the mother is demonstrated by gestation" was coined in 1983,[55] but until the advent of *in vitro* fertilization in the twentieth century, the definition of maternity was universally accepted. In any event, the mother of a child born abroad could not transmit citizenship at birth to her child. Like the 1790 and 1795 statutes, citizenship laws enacted in 1802[56] and 1855[57] required the child's father to be a resident of

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49. Price, *supra* note 44, at 141. *See also* United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898) ("'The [C]onstitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that.'" (quoting Minor v. Happersett, 88 U.S. 162, 167 (1874)) (internal quotation marks omitted)).

50. James Brown Scott, *Nationality:* Jus Soli *or* Jus Sanguinis, 24 AM. J. INT'L L. 58, 62 (1930) (referring to the Act of May 3, 1779, ch. 55, 1882 Va. Acts 129).

51. *See* U.S. CONST. art. I, § 8, cl. 4.

52. Rogers v. Bellei, 401 U.S. 815, 823 (1971).

53. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103–04 (creating uniform rules for naturalization).

54. Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, 414–15 (establishing uniform rules for naturalization). The 1795 Act deleted the reference to a child "born beyond sea," but was otherwise nearly identical to the 1790 Act in requiring the child's father to be a resident of the United States. *Compare id.* § 3 ("[T]he children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States."), *with* Act of Mar. 26, 1790, § 1 ("[T]he children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens.").

55. Baldassi, *supra* note 24, at 6 (quoting U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 282 (1988)) (internal quotation marks omitted).

56. Act of Apr. 14, 1802, ch. 28, 2 Stat. 153. The Naturalization Act of 1802 provided that "the children of persons who now are, or have been citizens of the United States, shall, though born

the United States but made no mention of the mother.[58] In 1907, Congress mandated that when a woman married a non-U.S. citizen, she lost her U.S. citizenship.[59] The U.S. Supreme Court upheld the statute's application to a woman who never resided abroad with her alien (British) husband on the grounds that "[t]he identity of husband and wife is an ancient principle of our jurisprudence."[60] The 1907 Act was later narrowed by the 1922 Cable Act to automatically strip the wife of U.S. citizenship only in cases where she married an alien ineligible for citizenship,[61] thus allowing many U.S. citizens with alien husbands to retain their citizenship. Still, the foreign-born children of a U.S. mother and an alien father were not eligible for citizenship at birth until 1934 when Congress amended the statute to include a child "whose father *or mother or both* at the time of the birth of such child is a citizen of the United States" and to require either the citizen father or the citizen mother to reside in the United States before "the birth of such child."[62] As one commentator noted, as of the 1934 Act:

> [T]he foreign born children of a Chinese or Japanese woman born in the United States would now be American. This is by way of sex equality, however, not racial equality since previously the children of no American woman, whatever her race, were American by virtue of her nationality. Even under the present law if the native born American woman of Japanese or Chinese decent were to have children born abroad by a husband racially ineligible to become a United States citizen it is not clear that they would have American nationality or be entitled to enter the United States.[63]

Thus, in early U.S. history, and until 1934, the critical question in determining citizenship for a child born abroad was the identity of the child's father. If the mother was married, her husband was presumed to

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out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." *Id.* § 4.

57. Act of Feb. 10, 1855, ch. 71, 10 Stat. 604. An article published in 1853 had pointed out that, by the terms of the April 1802 law, only parents who were U.S. citizens on or before April 14, 1802, could transmit U.S. citizenship to their children born abroad. *The Alienage of the United States*, 2 AM. L. REG. 193, 193 (1854); *see also* Weedin v. Chin Bow, 274 U.S. 657, 663–64 (1927) (discussing Binney's analysis of the 1802 law and the citizenship of children born abroad). The 1855 Act corrected this glitch by allowing persons "whose fathers were or shall be at the time of their birth citizens of the United States" to transmit citizenship to their children born abroad. *See* § 1, 10 Stat. at 604.

58. Miller v. Albright, 523 U.S. 420, 461–62 (1998) (Ginsburg, J., dissenting) (discussing statutes determining citizenship for a child based upon the father's residence).

59. Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1229.

60. Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

61. Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1021, 1022. An alien ineligible for citizenship referred to "the statutory exclusion of Asians from immigration eligibility." Kristin A. Collins, *A Short History of Sex and Citizenship: The Historians' Amicus Brief in* Flores-Villar v. United States, 91 B.U. L. REV. 1485, 1492 (2011).

62. Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797, 797 (emphasis added).

63. Lester B. Orfield, *The Citizenship Act of 1934*, 2 U. CHI. L. REV. 99, 116 (1934).

be the father—a principle followed in Roman times[64] and in English common law.[65] If the mother was unmarried, the child had no legally declared father or mother from whom to inherit[66] and could not claim U.S. citizenship through either parent. Children born abroad to a U.S. father and an alien secondary wife in a polygamous marriage, for example, were considered illegitimate and thus ineligible for *jus sanguinis*.[67]

Even with the marital presumption, an element of biology had long been part of the paternity determination. As early as the 1700s, the English common law provided that if the husband was "beyond the seas" at the relevant time, for example, he could challenge a finding that he was the father.[68] Science took a long time to ascertain when the "relevant time" was, however. Fluger demonstrated in 1861 that menstruation ceased in women whose ovaries were removed, and speculated "that menstruation and ovulation occurred simultaneously."[69] As late as the 1890s, American doctors were still unsure how ovulation was triggered and its connection to menstruation;[70] the relationship of hormones to ovulation was not detailed until the 1930s.[71] Thus, evidence to include or exclude a particular man as the father consisted of testimony regarding access to the woman, but until the 1930s, such testimony focused on the wrong time: the period of menstruation rather than ovulation.

The advent of blood testing provided a scientific means to identify, initially, who was *not* the father. In 1901, Dr. Karl Landsteiner announced his theories on blood groups, along with the suggestion that the groupings could be used in cases of disputed paternity, and in 1909 classified human blood into the groups still used today: A, B, AB, and O.[72] These new tests could only be used to *exclude* a man as the father.[73] For example, if the mother's blood was group A and the child's blood was

64. *See* 1 THE DIGEST OF JUSTINIAN, *supra* note 24, at 44; Baldassi, *supra* note 24, at 3.

65. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446 (14th ed. 1803).

66. *See id.* at 444. "A [child born out of wedlock] was *filius nullius*, the child of no one, and could inherit from neither father nor mother." JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 110 (9th ed. 2013).

67. *See* Mason *ex rel.* Chin Suey v. Tillinghast, 26 F.2d 588, 588–89 (1st Cir. 1928); Ng Suey Hi v. Weedin, 21 F.2d 801, 801–02 (9th Cir. 1927).

68. Glennon, *supra* note 6, at 562–63; *accord* James O. Pearson, Jr., Annotation, *Proof of Husband's Impotency or Sterility as Rebutting Presumption of Legitimacy*, 84 A.L.R.3d 495 (1978) (discussing cases where presumptive fathers disputed paternity presumptions).

69. BULLOUGH, *supra* note 17, at 27.

70. *Id.*

71. LAQUEUR, *supra* note 21, at 9. Before then, "standard medical-advice books recommended that to avoid conception women should have intercourse during the middle of their menstrual cycles, during days twelve through sixteen, now known as the period of *maximum* fertility." *Id.*

72. *Karl Landsteiner—Biographical*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/medicine/laureates/1930/landsteiner-bio.html (last visited Mar. 26, 2014).

73. William Edward Taay, *Blood Tests to Negative Paternity*, 23 MARQ. L. REV. 126, 126 (1939) (citing State v. Wright, 17 N.E.2d 428, 431 (Ohio Ct. App. 1938), *rev'd*, 20 N.E.2d 229 (Ohio 1939)) (discussing the use of blood-grouping tests).

group B, the father must have group B in his blood, and thus a father in group O would be excluded.[74] Although these blood tests were widely accepted in paternity cases in Europe in the late 1920s,[75] American courts were much more reluctant to consider them, even after Dr. Landsteiner won the Nobel Prize in Medicine in 1930 for this work.[76] U.S. courts struggled with three issues regarding the tests in the 1930s and 1940s: (1) whether the science was sufficiently established to admit the evidence; (2) if the evidence was admitted, how much weight it should be given; and (3) if a party refused to consent to a blood test, whether the court had the power to order it. The Supreme Court of South Dakota held in 1933 that the trial judge's refusal to order the mother and child to submit to a blood test was not an abuse of discretion because "it insufficiently appears that the validity of the proposed test meets with such generally accepted recognition as a scientific fact among medical men as to say that it constituted an abuse of discretion for a court of justice to refuse to take cognizance thereof. . . ."[77] Demonstrating how quickly the court's view of the science was changing, the same court clarified its decision in 1936, stating:

> [I]t is our considered opinion that the reliability of the blood test is definitively, and indeed unanimously, established as a matter of expert scientific opinion entertained by authorities in the field, and we think the time has undoubtedly arrived when the results of such tests, made by competent persons and properly offered in evidence, should be deemed admissible in a court of justice whenever paternity is in issue.[78]

Nevertheless, the court found no error in the trial court's refusal to order blood tests in 1931 because "the literature of the topic of the scientific reliability of the blood test (at least the body of such literature available in the English language) is, for the most part, subsequent to that date."[79]

Even after courts ruled the evidence was admissible, and science agreed that the blood test could definitively exclude someone as a par-

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74. *See, e.g.*, Arais v. Kalensnikoff, 74 P.2d 1043, 1045 (Cal. 1937) ("According to the Mendelian law of inheritance, this blood individuality is an hereditary characteristic which passes from parent to child, and no agglutinating substance can appear in the blood of a child which is not present in the blood of one of its parents. According to the testimony of the physician in this case, the blood of the child 'contains the agglutinogen B which is not present in the blood of the mother and therefore must have been present in the blood of the father'; but the blood of the defendant does not contain this element. . . . [T]herefore . . . the defendant cannot be the father." (citation omitted)); Commonwealth v. Zammarelli, 17 Pa. D. & C. 229, 230 (1931).

75. *In re* Swahn's Will, 285 N.Y.S. 234, 236 (Sur. Ct. 1936) (finding credible evidence "that blood-grouping tests are commonly accepted as admissible evidence on questions of paternity in the courts of Germany, Austria, Denmark, Sweden, Italy, Russia, Poland, Japan, and England" with "over 5,000 instances . . . between 1926 and 1929" in continental Europe).

76. *Karl Landsteiner—Biographical*, *supra* note 72.

77. State v. Damm (*Damm I*), 252 N.W. 7, 12 (S.D. 1933), *aff'd*, 266 N.W. 667 (S.D. 1936).

78. State v. Damm (*Damm II*), 266 N.W. 667, 668 (S.D. 1936).

79. *Id.* at 671.

ent,[80] triers of fact were not always persuaded by the expert testimony. The Supreme Court of California upheld a decision that the defendant was the father despite blood test evidence that excluded him, stating that the trial court appropriately weighed "the testimony of the mother and her witnesses on the one hand and the evidence of the defendant, including the blood test, on the other."[81] One of the most famous cases involved the actor Charlie Chaplin. Despite a stipulation from the mother and her attorney that the paternity case would be dismissed with prejudice should the blood test exclude Chaplin as the father, and a subsequent test that did so exclude him, the jury's verdict of paternity was upheld.[82]

Once courts decided the tests were admissible, a further problem remained: did courts have the inherent power to order a reluctant party to submit to the test? An early decision in New York holding that a court had such power was unanimously reversed,[83] prompting the New York legislature to enact a statute in 1935 to grant such power to a court "[w]herever it shall be relevant to the prosecution or defense of an action."[84] Similar statutes were enacted in Wisconsin in 1937,[85] New Jersey in 1939,[86] and Ohio in 1940.[87] In the absence of a specific blood test statute, some courts found "an inherent power to order [a] physical examination" without a specific statute.[88] A federal court interpreted Federal Rule of Civil Procedure 35, which generally allowed a court to order a physical examination if the condition is in controversy, to extend to a blood test.[89] The Uniform Act on Blood Tests to Determine Paternity, proposed in 1952, provided a solution to these questions, but was adopted by very

80. While most of the cases involved paternity, the tests could also be used to determine maternity. Ludvig Hektoen, *Biologic Tests for Medicolegal Purposes*, 199 NEW ENG. J. MED. 120, 126 (1928) (two women both claimed to be the mother of a child).

81. Arais v. Kalensnikoff, 74 P.2d 1043, 1047 (Cal. 1937).

82. Berry v. Chaplin, 169 P.2d 442, 449–52 (Cal. Dist. Ct. App. 1946).

83. Beuschel v. Manowitz, 271 N.Y.S. 277, 280–82 (Sup. Ct. 1934), *rev'd*, 272 N.Y.S. 165 (App. Div. 1934).

84. *See In re* Swahn's Will, 285 N.Y.S. 234, 237–38 (Sur. Ct. 1936) (quoting section 306-a of the New York Civil Practice Act) (internal quotation mark omitted).

85. WIS STAT. § 325.23 (1937); *see also* Beach v. Beach, 114 F.2d 479, 480 n.4 (D.C. Cir. 1940) (identifying Wisconsin's statute as an example of a state law authorizing courts to order blood tests to determine paternity when relevant).

86. N.J. STAT. ANN. § 2:99-3 to -4 (West 1939); *see also Beach*, 114 F.2d at 480 n.4 (identifying New Jersey's statute as an example of a state law authorizing courts to order blood tests to determine paternity when relevant).

87. OHIO REV. CODE ANN. § 12122.1 to .2 (West 1940); *see also Beach*, 114 F.2d at 480 n.4 (identifying Ohio's statute as an example of a state law authorizing courts to order blood tests to determine paternity when relevant).

88. *See, e.g.*, *Damm II*, 266 N.W. 667, 670 (S.D. 1936) ("Though the cases are not entirely in accord, it is distinctly the majority view that the courts have an inherent power to order physical examination even in the absence of statute.").

89. *See, e.g.*, *Beach*, 114 F.2d at 481 (holding that Fed. R. Civ. P. 35(a), which allows a court to order a mental or physical examination of a party in an action in which such condition is in controversy, gives a court authority to order a party to submit to a blood test).

few states in the 1950s and 1960s.[90] Section 1 of the Uniform Act empowered the court to "order the mother, child[,] and alleged father" to undergo blood tests in any civil action "in which paternity [wa]s a relevant fact."[91] Section 4 declared that, if all the experts concluded that the alleged father was not the father of the child, "the question of paternity shall be resolved accordingly."[92] If the blood tests did not exclude the father, the court exercised its discretion on whether to admit the evidence because the test was capable of excluding only 50% of the male population as a potential parent.[93]

III. *JUS SANGUINIS* FROM 1952 TO THE PRESENT

In 1952, Congress enacted the Immigration and Nationality Act (INA), which remains in large part the law today.[94] The Act gave the Secretary of State the responsibility to administer and enforce the law "relating to . . . the determination of nationality of a person not in the United States."[95] The INA required a blood relationship to transmit citizenship from a U.S. citizen father to a child born out of wedlock abroad.[96] At that time, blood tests were admissible in many American courts to exclude a man as the possible father of the child, but other evidence was needed to establish paternity.[97] Nineteen states adopted the 1973 Uniform Parentage Act,[98] which provided for blood tests in Section 11 and governed the admissibility of the results in a paternity action in Section 12.[99] However, it was not until the development of the human leukocyte antigen (HLA) test in the late 1970s, and then DNA tests, that the parent could be determined solely by science in the vast majority of cases. HLA tests, which examined tissue for various antigen markers, increased the reliability of the results, especially when used in conjunction with blood tests, to exclude over ninety-one percent of all non-

90. A. Frederick Harris, *Some Observations on the Un-Uniform Act on Blood Tests to Determine Paternity*, 9 VILL. L. REV. 59 app. at 76 (1963). California, New Hampshire, Oregon, Pennsylvania, Utah, and Michigan initially adopted the 1952 Act. *Id.* at 59 n.2. California, Louisiana, New Hampshire, Oregon, and Pennsylvania currently have versions of the Uniform Act. CAL. FAM. CODE §§ 7550–58 (West 2013); LA. REV. STAT. ANN. §§ 9:396–:398.2 (2013); N.H. REV. STAT. ANN. §§ 522:1–:9 (2013); OR. REV. STAT. ANN. §§ 109.250–.264 (West 2013); 23 PA. CONS. STAT. § 5104 (2013).

91. Harris, *supra* note 90, app. at 76.

92. *Id.*

93. Kevin L. Petrasic, Note, Cutchember v. Payne*: Approaching Perfection in Paternity Testing*, 34 CATH. U. L. REV. 227, 231–32 (1984).

94. *See* U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 7 FAM §§ 1133.1–.3 (2010).

95. Immigration and Nationality Act of 1952 (INA), ch. 477, § 104, 66 Stat. 163, 174 (current version at 8 U.S.C. § 1104(a)(3) (2012)).

96. *Id.* § 309, 66 Stat. 163, 238.

97. Glennon, *supra* note 6, at 556.

98. *Why States Should Adopt UPA*, UNIFORM L. COMMISSION, http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPA (last visited May 15, 2014).

99. *Parentage Act Summary*, UNIFORM L. COMMISSION, http://uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Mar. 27, 2014).

fathers.[100] In the late 1980s, DNA tests allowed courts to determine the probability of paternity at a rate over ninety-nine percent.[101]

Because the birth mother was always the genetic mother until the advent of *in vitro* fertilization in 1978,[102] determining maternity was simple. Courts routinely noted that there was no problem establishing maternity; the difficulty was always paternity.[103] For children conceived without assisted reproduction, American courts and statutes typically determine paternity by first ascertaining whether the birth mother is married; if she is, then her husband is the presumed father.[104] Several states allow the husband a brief window of time to dispute his paternity before it becomes conclusive,[105] while others impose generous or no time limits on the presumed father's right to rebut.[106] To preserve family harmony, a

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100. Petrasic, *supra* note 93, at 233–34.

101. Glennon, *supra* note 6, at 555–56.

102. In vitro fertilization (IVF) involves surgically removing the eggs from a woman and combining them with the sperm in the lab to form a preembryo; the preembryo is then implanted in a woman's uterus. In 1978, doctors in the United Kingdom announced the first successful birth of a child after using IVF. *1978: First 'Test Tube Baby' Born*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/july/25/newsid_2499000/2499411.stm (last visited Mar. 27, 2014).

103. *E.g.*, Soos v. Superior Court, 897 P.2d 1356, 1362 (Ariz. Ct. App. 1994) (Gerber, J., concurring) (stating that the issue of maternity "seems to present no great practical problem because maternal identity always seems to be a given fact"); Lohman v. Carnahan, 963 So. 2d 985, 988 (Fla. Dist. Ct. App. 2007) ("For centuries, the law developed on the assumption that a mother's parentage was certain, but a father's connection to a child could be open to doubt."). *But see* Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 603–04 (2009) (recognizing that assisted reproductive technology may complicate maternity determinations).

104. *E.g.*, ARIZ. REV. STAT. ANN. § 25-814 (2013); GA. CODE ANN. § 19-7-20 (2013); HAW. REV. STAT. § 584-4 (2013); KAN. STAT. ANN. § 23-2208 (2013); UTAH CODE ANN. § 78B-15-204 (West 2013). This marital presumption may apply to a same-sex married couple in a state that recognizes such marriages. In *Della Corte v. Ramirez*, the court held that because Della Corte (the birth mother) and Ramirez were married when the child was born and Ramirez had consented to the procedure, Ramirez was the child's legal parent pursuant to a Massachusetts law stating that "[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband." 961 N.E.2d 601, 602–03 (Mass. App. Ct. 2012) (emphasis omitted) (quoting MASS. GEN. LAWS ch. 46, § 4B (2012)) (internal quotation marks omitted). The court wrote, "We do not read 'husband' to exclude same-sex married couples, but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances." *Della Corte*, 961 N.E.2d at 603.

105. In California and Delaware, for example, the husband has two years to challenge the presumption of paternity. CAL. FAM. CODE § 7541 (West 2013); DEL. CODE ANN. tit. 13, § 8-607 (2013); *In re* Paulson, No. CS99-03153, 2006 Del. Fam. Ct. LEXIS 281, at *30–31 (Del. Fam. Ct. Sept. 15, 2006) (referencing Delaware's presumed paternity statute). In Louisiana, the husband has one year from the day he "learns or should have learned of the birth of the child," unless the husband and wife lived separate and apart for the 300 days preceding the birth. LA. CIV. CODE ANN. art. 189 (2013). Similarly, the District of Columbia provides two years to rebut the presumption unless the presumed father did not live with the mother for the 300 days preceding the birth and did not openly hold out the child as his own. D.C. CODE § 16-2342 (2012).

106. *E.g.*, ALA. CODE § 26-17-607(a) (2013); ARIZ. REV. STAT. ANN. § 25-814 (2013); COLO. REV. STAT. § 19-4-105 (2013); GA. CODE ANN. § 19-7-20 (2013); HAW. REV. STAT. § 584-4 (2013); KAN. STAT. ANN. § 23-2209 (2013) (a child or a person on behalf of the child can bring an action any time if the relationship is presumed, but if not, a child or a person on behalf of the child can bring an action "at any time until three years after the child reaches the age of majority"); ME. REV. STAT. ANN. tit. 19-A, § 1562 (2013); MD. CODE ANN., FAM. LAW § 5-1027 (West 2013); UTAH

man who believes he is the genetic father but is not married to the mother has no standing to assert his parenthood in many states.[107] Thus, in some cases genetics is trumped by the marital presumption for paternity.

If the birth mother is not married, genetics play a wider role in determining paternity, although they still might not be conclusive. In a typical statute, the genetic father can claim paternity by participating in the child's life.[108] DNA alone is not enough; the man must act as the child's parent in some way.[109] As the United States Supreme Court observed in *Lehr v. Robertson*[110]:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[111]

In 1978, when the first child was born using *in vitro* fertilization, maternity became an issue as well. Now that doctors were removing a

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CODE ANN. § 78B-15-607 (West 2013) (presumption for child of marriage may be rebutted at any time prior to filing action for divorce or in pleadings for divorce).

107. *E.g.*, P.G. v. G.H., 857 So. 2d 823, 825, 830 (Ala. Civ. App. 2002) (holding that despite DNA test establishing ninety-nine percent probability that G.H., not the birth mother's husband, was the child's father, G.H. lacked standing to assert paternity as long as birth mother's husband maintained that he was father of her child); Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399, 402–03 (Cal. Ct. App. 1998) (holding that Karen M.'s husband, not Rodney F., was the "presumed father" of the child born to Karen M., a married woman, and thus Robert F. had no standing to sue for paternity); J.S. v. S.M.M., 67 So. 3d 1231, 1233 (Fla. Dist. Ct. App. 2011) (S.M.M. could not challenge paternity of husband when child born to wife of intact marriage); Barnes v. Jeudevine, 718 N.W.2d 311, 315–16 (Mich. 2006) (affidavit of parentage and birth certificate naming former boyfriend as child's father did not rebut presumption that birth mother's husband was father; boyfriend had no standing to assert paternity); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B. U. L. REV. 227, 236 n.37 (2006) (identifying a few states that allow a man to challenge a husband's status as father, but noting that, "[n]onetheless, procedural doctrines of finality, such as issue preclusion and collateral estoppel, prevent genetics-based challenges to adjudicated determinations of the husband's presumed paternity").

108. *E.g.*, UNIF. PARENTAGE ACT § 4(a) (1973) ("A man is presumed to the natural father of a child if: . . . (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child . . . ."); UNIF. PARENTAGE ACT § 204(a) (2002) ("A man is presumed to be the father of a child if: . . . (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.").

109. Caban v. Mohammed, 441 U.S. 380, 389, 392 (1979) (holding that a state statute that allowed unwed mothers, but not unwed fathers, a veto over the adoption of the couple's children violated the Equal Protection Clause of the U.S. Constitution, but noting, however, that "[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child"); Quilloin v. Walcott, 434 U.S. 246, 254 n.14, 255–56 (1978) (holding that adoption of a child did not violate the genetic father's due process and equal protection rights because, for eleven years between the child's birth and the adoption petition, the man had not legitimized the child and did not have custody).

110. 463 U.S. 248 (1983).

111. *Id.* at 262 (footnote omitted).

woman's eggs and fertilizing them in the lab, the woman who gave birth might not be the genetic mother: She could be using eggs donated from another woman, or she could be a gestational carrier. Rather than assume that the woman who gave birth was the mother, the State Department required the woman to have a blood relationship to the child as well, even if she was married to the child's genetic father.[112] "The laws on acquisition of U.S. citizenship through a parent have always contemplated the existence of a blood relation between the child and the parent(s) through whom citizenship is claimed,"[113] the Department of State Foreign Affairs Manual asserts. Thus, even if the child is born in wedlock and presumed to be the issue of that marriage, "This presumption [of parentage] is not determinative in citizenship cases . . . because an actual blood relationship to a U.S. citizen parent is required."[114] The Ninth Circuit has rejected the State Department's interpretation in two cases that did not involve ART, holding that a child was entitled to U.S. citizenship even though the child lacked a genetic tie to the U.S.-citizen parent.[115] Others have criticized the State Department's interpretation of the Act, arguing that it goes beyond the language of the statute.[116]

In late 2013, the State Department quietly amended its website to recognize giving birth as a means to prove maternity.[117] With this change, the State Department reflected language in recent U.S. Supreme Court cases that assumes that the woman who gives birth is also the genetic mother of the child.[118] Justice Stevens's opinion in *Miller v. Albright*[119] in 1998, for example, is based solidly on that assumption. In noting the requirements for a single woman to convey her U.S. citizenship to her child born abroad, the court stated that "she must first choose to carry the pregnancy to term and reject the alternative of abortion . . . .

112. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, 7 FAM § 1131.4-1.a (2010).

113. *Id.*

114. *Id.*

115. *See* Solis-Espinoza v. Gonzales, 401 F.3d 1090, 1094 (9th Cir. 2005) (holding that a child was born in wedlock and was not deportable, even though the child had no genetic tie to a U.S. citizen, because the birth mother gave up the child to the genetic father and his U.S. citizen wife); Scales v. INS, 232 F.3d 1159, 1165–66 (9th Cir. 2000) (holding that a child was born in wedlock and was thus a "legitimate child" under the INA because, at the time of the child's birth, the Philippine mother was married to a U.S. citizen, even though the child was conceived prior to the marriage by a non-U.S. father).

116. *E.g.*, Titshaw, *supra* note 5, at 105; Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 451 (1997) (arguing, for example, that in cases where donor eggs are fertilized with the husband's sperm and then implanted into the wife, "[t]here seems to be no reason not to treat the wife as the mother of the child for immigration purposes, where it is clear that the egg donor waived any rights in possible offspring").

117. "[A] U.S. citizen mother must be either the genetic or the gestational and legal mother of the child at the time and place of the child's birth." U.S. Dep't of State, *supra* note 5.

118. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 433–34 (1998); Nguyen v. INS, 533 U.S. 53, 61 (2001).

119. 523 U.S. 420 (1998).

She must then actually give birth to the child."[120] By so doing, "[t]he blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates" thus differentiating her conduct from that of the unwed father, who may not even be aware of the birth.[121] Writing for the majority in a more recent citizenship case, Justice Kennedy likewise assumed that the birth mother is always genetically related to her child. He declared that "[f]irst, a citizen mother expecting a child and living abroad has the right to reenter the United States so the child can be born here and be a [Fourteenth] Amendment citizen."[122] That option would not be available if a foreign gestational carrier gives birth to the child. Echoing Justice Stevens in *Miller*, Justice Kennedy asserted that "[i]n the case of the mother, the [biological parent–child] relation is verifiable from the birth itself."[123] If that were true, however, all three of the women in our case studies, American citizens who gave birth in Switzerland, Israel and India, would have transmitted their U.S. citizenship to their children had the language now used on the website been followed.[124]

IV. DETERMINING PARENTAGE FOR A CHILD CONCEIVED USING ART

How should we determine parentage, and in particular maternity, now that genetics and gestation can be separated through assisted reproduction technology (ART)? For centuries, we had only one test for maternity: the mother was (and still is, in most cases) the woman who gave birth, the parturient. Many countries have adopted the parturient rule, including Argentina, Austria, Chile, France, Germany, Japan, the Netherlands, Portugal, Spain, Switzerland, and the U.K.[125] The rule is justified because:

> [I]t is predictable, pragmatic and not dependent on further analysis, such as a genetic test; it thus promotes legal certainty. Second, the woman carrying the child is the person who, during pregnancy and at birth, establishes a strong physical and psychological bond with the child. . . .
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> . . . .
>
> This can also be [a] coherent choice for legal systems where surrogate motherhood, while not prohibited, is discouraged or strongly regulated. If a surrogacy agreement is entered into nonetheless, without complying with the prescribed rules, the consequence again

120. *Miller*, 523 U.S. at 433.
121. *Id.* at 436, 438.
122. Nguyen v. INS, 533 U.S. 53, 61 (2001).
123. *Id.* at 62.
124. The State Department website now recognizes the "genetic *or the gestational*" mother to transmit her citizenship to the child. U.S. Dep't of State, *supra* note 5 (emphasis added).
125. Daniel Gruenbaum, *Foreign Surrogate Motherhood:* Mater Semper Certa Erat, 60 AM. J. COMP. L. 475, 476–77 (2012).

> would be that the parturient, not the commissioning woman, should be considered the legal mother.[126]

As a New Jersey Court observed in denying a pre-birth order that would have declared that the genetic parents, not the gestational carrier, were the parents of the child:

> A bond is created between a gestational mother and the baby she carries in her womb for nine months. During the pregnancy, the fetus relies on the gestational mother for a myriad of contributions. A gestational mother's endocrine system determines the timing, amount and components of hormones that affect the fetus. The absence of any component at its appropriate time will irreversibly alter the life, mental capacity, appearance, susceptibility to disease and structure of the fetus forever. The gestational mother contributes an endocrine cascade that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life.[127]

Susan Appleton favors the parturient rule as a functional test that a woman can meet "in an objectively ascertainable way."[128] Unlike a genetic test, which would "wreak havoc" with donated gametes and would require routine genetic testing, or an intent-based test, which requires a court to ascertain the parents, Appleton's test recognizes that a woman who gestates a child for nine months has performed parental functions.[129] Jennifer Hendricks also advocates for the parturient rule, emphasizing that "[a] woman acquires initial parental rights by having biological offspring whom she gestates and to whom she gives birth; a man acquires similar rights by caring for his offspring after they are born."[130] Like Appleton, she notes that the test also allows maternity to be determined without involvement by the state.[131]

The chief consequence of the parturient test is that it excludes those who want genetic children if neither partner can gestate a child, because the gestational carrier is deemed the mother.[132] For states that seek to ban

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126. *Id.* at 477–79 (footnote omitted).

127. A.H.W. v. G.H.B., 772 A.2d 948, 953–54 (N.J. Super. Ct. Ch. Div. 2000).

128. Appleton, *supra* note 107, at 283.

129. *Id.* at 283–84.

130. Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 444 (2007) (footnote omitted).

131. *Id.* at 466.

132. Susan Appleton has pointed out a possible solution that some scholars have advocated: apply the parturient rule only in cases of coital reproduction and donor insemination, but not when a gestational carrier is used. Appleton, *supra* note 107, at 264–66. Ultimately, she rejected this variation:

> Try as I might, I cannot escape the conclusion that, in applying a functional test to construct a default rule operative at the time of birth, the woman gestating the pregnancy—the "surrogate"—will always have met the test, given the unique parental functions she has performed during pregnancy . . . .

or limit gestational carrier arguments, this would be a positive outcome of the parturient test, even though it would preclude a number of infertile couples, including all gay couples, from having children with a genetic tie to one of the intended parents. Several states have attempted to curb the use of gestational carrier agreements by stating that the gestational carrier is the legal mother of the resulting child,[133] but an irrefutable presumption of maternity has been successfully challenged in two states.[134]

The highly publicized "Baby Manji" case illustrates the danger of the parturient test for a gestational carrier. In 2007, a Japanese couple, Ikufumi and Yuki Yamada, entered into a gestational carrier agreement with an Indian woman, Pritiben Mehta.[135] The Yamadas were not alone; at that time India's commercial surrogacy industry was estimated to bring in $445 million per year.[136] An anonymously donated egg was fertilized with Mr. Yamada's sperm, and the resulting pre-embryo was implanted in Ms. Mehta.[137] The Yamadas divorced in June 2008, one month before Baby Manji was born, and only Mr. Yamada sought parentage of the child.[138] The Japanese Embassy in India refused to give the child a passport or visa because Japanese law does not recognize surrogate children.[139] India would not issue a birth certificate because Indian law requires both the mother and the father to be named, and authorities were unsure whether the gestational carrier, the egg donor, or the intended mother was the mother of the child, especially since none of the three sought to be declared the mother.[140] With no birth certificate, India refused to issue a passport, and so Baby Manji was stateless. Mr. Yamada did not have the option to adopt his own genetic child; an 1890 law prohibits single men from adopting baby girls.[141] Following argument in the India Supreme Court, the Indian government agreed to issue an identity

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Id. at 275. The new Uniform Probate Code (UPC) amendments (2008) for children of assisted reproduction have adopted this solution. UPC § 2-120 declares that the woman who gives birth is the mother if she is not a gestational carrier; another section, UPC § 2-121, applies when a gestational carrier is used to declare that the woman who gives birth is ordinarily not considered the mother of the child. Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL'Y 335, 341 & nn.46–48 (2011).

133. ARIZ. REV. STAT. § 25-218, *invalidated by* Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994); UTAH CODE ANN. § 76-7-204 (repealed 2005).

134. *Soos*, 897 P.2d at 1360–61; J.R. v. Utah, 261 F. Supp. 2d 1268, 1283 (D. Utah 2002).

135. Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, KENAN INST. FOR ETHICS DUKE U. 2 (2009), *available at* https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf.

136. *Id.* at 3.

137. *Id.* at 2.

138. *Japan Gate-Pass for Baby Manji*, TELEGRAPH (Oct. 18, 2008), http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp.

139. Points, *supra* note 135, at 5.

140. *Id.*

141. *Id.*

certificate for Baby Manji, after which the Japanese embassy issued her a one-year visa to travel to Japan.[142]

Some argue that the parturient test shortchanges the harm suffered by the intended parents while emphasizing the loss felt by the gestational carrier;[143] it assumes that the bond felt by the parturient is superior to those developed by parents who lack a genetic or adoptive tie to the child, an assumption that is not supported by existing studies.[144] It also allows a gestational carrier who has agreed to relinquish the child at birth to renege on her promise.[145] The test places great emphasis on the bond formed during pregnancy, arguably making it superior to parental bonds formed later. Part of this bond may be chemical. Many pregnant women experience an increase in the hormone oxytocin (OT), which is believed to encourage postpartum behaviors (such as nursing) and to "prime[] the mental processes required for affiliative bonds."[146] "[M]aternal bonding to the fetus during the third trimester was predicted by the increase in plasma OT from the 1st to the 3rd trimester, indicating dynamic associations between OT and the evolving maternal-infant bond."[147] But not all pregnant women have high levels of OT; those with low levels are associated with symptoms of depression both before and after the birth.[148] High OT levels are also found in foster parents[149] and women playing with children not their own.[150] A number of studies have found that adoptive parents and their children have strong relationships.[151] Thus, the

142. *Finally, Baby Manji Flies to Papa in Japan Today*, TIMES INDIA (Oct. 31, 2008, 17:56 IST), http://articles.timesofindia.indiatimes.com/2008-10-31/jaipur/27907561_1_japanese-surrogate-baby-manji-yamada-surrogate-child.

143. *See, e.g.*, John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 407 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 366 (1990).

144. *See* Hill, *supra* note 143, at 399–400.

145. *Id.* at 393; John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 1014–15 (1986); Shultz, *supra* note 143, at 384.

146. Ruth Feldman et al., *Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding*, 18 PSYCHOL. SCI. 965, 969 (2007). *See also* Wendy Saltzman & Dario Maestripieri, *The Neuroendocrinology of Primate Maternal Behavior*, 35 PROGRESS NEURO-PSYCHOPHARMACOLOGY & BIOLOGICAL PSYCHIATRY 1192, 1197 (2011) (noting the correlation of OT and attachment to fetus, such that OT may act to facilitate the onset of maternal behavior).

147. Ruth Feldman, *Oxytocin and Social Affiliation in Humans*, 61 HORMONES & BEHAV. 380, 384 (2012).

148. *Id.* at 386; *see also* Feldman et al., *supra* note 146, at 969.

149. Feldman et al., *supra* note 146, at 386.

150. Johanna Bick & Mary Dozier, *Mothers' Concentrations of Oxytocin Following Close, Physical Interactions with Biological and Nonbiological Children*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 100, 104 (2010) ("Mothers showed higher levels of oxytocin following interactions with unfamiliar children than following interactions with their own children.").

151. Hill, *supra* note 143, at 402–03 & n.255; Steven L. Nickman et al., *Children in Adoptive Families: Overview and Update*, 44 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 987, 989 (2005) (stating that in a study of 715 adoptive families in the United States, ninety-five percent of the adoptive parents endorsed the statement "I feel deeply attached to my child" (internal quotation marks omitted)).

parturient test may assume a strong bond where none in fact exists, and discount the bonds formed between parents and children after the child's birth.

In the three cases cited above,[152] in which American women used donated ova to give birth to a child in Switzerland, Israel or India, a parturient test would provide the most equitable result. All three women used donated eggs to become pregnant and give birth to children that they intended to raise. In the United States, each of the three women would be the presumed mother because she gave birth to the child.[153] No one is likely to challenge her status as the mother if the egg donor is truly a donor,[154] although many states have yet to enact statutes eliminating parental status for an egg donor.[155] Thus, for our three present cases, the matter could be easily resolved by changing the State Department regulations to mirror existing state law and the language on the State Department's website. However, because a parturient test would exclude infertile couples from being presumed parents in many cases, other parentage tests should also be considered.

Now that the science has progressed to the point that we can positively identify a child's genetic parents with a very high degree of certainty,[156] should that be our test for parentage? Anthony Miller is a key proponent of the view that genetics should be one of the tests for parentage, arguing that the biological connection is unique and worthy of constitutional protection.[157] Indeed, he asserts that presumptions (such as the marital presumption) that prevent a genetic father from proving paternity may violate a man's substantive and procedural due process rights.[158] A genetic test would always exclude at least half of a same-sex couple from claiming parentage; it would also insert a third (or even fourth) party into

152. *See supra* notes 12–14 and accompanying text.

153. UNIF. PARENTAGE ACT § 201(a)(1) (2002); Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 524 (1996).

154. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 675, 678, 682 (Cal. 2005) (concluding the woman who donated an egg to her same-sex partner and the woman who gives birth to the child are both parents).

155. See CAL. FAM. CODE § 7613(b) (West 2012); 750 ILL. COMP. STAT. 40/3(b) (2013); KAN. STAT. ANN. § 23-2208(f) (West 2013); MINN. STAT. § 257.56(2) (2013); MO. REV. STAT. § 210.824(2) (2013); MONT. CODE ANN. § 40-6-106(2) (2013); NEV. REV. STAT. ANN. § 126.061(2) (West 2011); WISC. STAT. § 891.40(2) (2013), for examples of statutes that state that a sperm donor is not a parent but do not explicitly include an egg donor.

156. *See, e.g.*, E. Donald Shapiro, Stewart Reifler & Claudia L. Psome, *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 29–30 (1992–93) (stating that current tests determine probability of parentage to 99.999999% accuracy); *cf.* State *ex rel.* Dep't of Soc. Servs. v. Miller, 218 S.W.3d 2, 3–4 (Mo. Ct. App. 2007) (finding that blood tests showed that twin brothers each had a 99.999% probability of being the father).

157. Anthony Miller, *Baseline, Bright-Line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 694–97 (2003).

158. Anthony Miller, *The Case for the Genetic Parent:* Stanley, Quilloin, Caban, Lehr, *and* Michael H. *Revisited*, 53 LOY. L. REV. 395, 437, 440–41 (2007).

any couple—heterosexual or homosexual—using donated gametes.[159] The main allure of the test—its certainty—may prove to be ephemeral as science progresses. Even today, a DNA test is unable to discern parentage in cases of identical twins.[160] Two recent cases, neither involving assisted reproduction, struggled with the issue of paternity when the potential father was an identical twin. Because DNA tests established both men as the father, other evidence—the old nineteenth century, eighteenth century, even seventeenth century tests of access to the mother—was needed to determine which twin had fathered the child.

In the future, scientific advances in assisted reproduction technology may open the door to children with mixed DNA, thus rendering the DNA tests inconclusive in more instances. In the early 1990s, researchers reported a controversial and highly successful ART that created genetic anomalies in the children. Dr. Jacques Cohen pioneered a solution for female infertility in which the ooplasm (cytoplasm) of a donor egg was injected into the egg of a woman who had had difficulty conceiving.[161] The initial attempts resulted in twelve clinical pregnancies after twenty-eight attempts in twenty-five women, a rate "higher than expected" in a population in which participants had had difficulty conceiving.[162] Over the next several years, as many as thirty children were born using this technique.[163] After confirmation that some of the children had genetic material from three sources (the donor egg, the intended mother's egg, and the sperm),[164] the Food and Drug Administration notified Dr. Cohen and his team that the use of techniques such as ooplasm transfer "constitutes a clinical investigation and requires submission of an Investigation-

159. *See, e.g.*, Dantzig v. Biron, No. 07CA1, 2008 WL 187532, at *1–3 (Ohio Ct. App. Jan. 18, 2008) (dismissing action brought by genetic father who sued gestational carrier for paternity for failure to join the natural mother, the egg donor, as a party).

160. *See* Dep't of Pub. Aid *ex rel.* Masinelli v. Whitworth, 652 N.E.2d 458, 459–60 (Ill. App. Ct. 1995) (deciding blood tests showed that either twin brother could be father of child despite testimony by mother of child that she had sexual relations with one brother but not the other); *Miller*, 218 S.W.3d at 3–4, 6 (finding that blood tests showed that twin brothers each had a 99.999% probability of being the father; because mother testified to having had sexual relations with both brothers, the court used other evidence to determine which brother had access to mother at time of conception). Because the children in these cases were conceived coitally, evidence other than genetic tests could be used to determine paternity.

161. Jacques Cohen et al., *Ooplasmic Transfer in Mature Human Oocytes*, 4 MOLECULAR HUM. REPROD. 269, 277 (1998).

162. Jason A. Barritt et al., *Mitrochondria in Human Offspring Derived from Ooplasmic Transplantation*, 16 HUM. REPROD. 513, 513 (2001).

163. David Whitehouse, *Genetically Altered Babies Born*, BBC NEWS (May 4, 2001, 15:26 GMT), http://news.bbc.co.uk/2/hi/sci/tech/1312708.stm.

164. Barritt, *supra* note 162, at 513; Heidi Mertes & Guido Pennings, *Embryonic Stem Cell-Derived Gametes and Genetic Parenthood: A Problematic Relationship*, 17 CAMBRIDGE Q. HEALTHCARE ETHICS 7, 8 (2008) ("[O]ne objection persists against both ooplasmic transfer and oocyte nuclear transfer, namely, that the resulting child would have two genetic mothers: one providing the nuclear DNA (and in the [ooplasmic] case most of the mtDNA) and another providing mitochondrial DNA.").

al New Drug application (IND) to FDA,"[165] shutting down the experiment in the United States.[166] Doctors developing a related procedure to overcome infertility, in which the nucleus from one woman's egg was injected into a donor egg, halted their research after the FDA letter and gave their results to doctors in China.[167] Most recently, scientists have replaced mutated mitochondrial DNA with donor DNA, reporting that 70% of the experimental eggs were successfully fertilized.[168] A recent article in *The Economist* describing Dr. Shoukhrat Mitalipov's work at the Oregon Health and Science University featured a cover banner that proclaimed "The benefits of having three parents."[169] Even without human intervention to alter DNA, there is evidence that mitochondrial heteroplasmy, in which mitochondrial DNA inherited from the mother is not identical in all samples from a single person, can occur spontaneously.[170] Although DNA tests today sequence nuclear DNA and not mitochondrial DNA, we can't assume that this will always be the case as science progresses.

In the future, the use of inheritable genetic modifications (IGM) could alter DNA such that the child's DNA would not reflect the genetic makeup of her parents. Scientists are experimenting with ways to alter a specific gene through *in vitro* fertilization, gene transfer, stem cells, and

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165. Letter from Kathryn C. Zoon, Dir., Ctr. for Biologics Evaluation & Research, Food & Drug Admin., to Sponsors / Researchers, Dep't of Health and Human Servs. et al. (July 6, 2001), *available at* http://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/ucm105852.htm.

166. The risks associated with mixing the mitochondrial DNA (mtDNA) are not known, but there is speculation that the donor might transmit a hereditary disease or alter certain behavioral traits. Mertes & Pennings, *supra* note 164, at 8; *see also* Rachel Levy et al., *Cytoplasmic Transfer in Oocytes: Biochemical Aspects*, 10 HUM. REPROD. UPDATE 241, 245 (2004) (noting that mtDNA is transmitted only by the female for an evolutionary reason, and so including mtDNA from a second female might have unexpected effects); M. De Rycke et al., *Epigenetic Risks Related to Assisted Reproductive Technologies*, 17 HUM. REPROD. 2487, 2491 (2002) ("Ooplasmic transfer into human oocytes may induce conflicts between the multiple genome parts (nuclear DNA, recipient mtDNA, donor mtDNA) and lead to unpredictable outcomes."); E. Scott Sills et al., *Genetic and Epigenetic Modifications Associated with Human Ooplasm Donation and Mitochondrial Heteroplasmy—Considerations for Interpreting Studies of Heritability and Reproductive Outcome*, 62 MED. HYPOTHESES 612, 615 (2004) (observing that negative outcomes may not be known for several decades). Note that the nuclear DNA is not affected by ooplasmic transfer. *See* A.L. Bredenoord et al., *Ooplasmic and Nuclear Transfer to Prevent Mitochondrial DNA Disorders: Conceptual and Normative Issues*, 14 HUM. REPROD. UPDATE 669, 670 (2008).

167. *See* Denise Grady, *Pregnancy Created Using Egg Nucleus of Infertile Woman*, N.Y. TIMES, Oct. 14, 2003, at A1.

168. Gautam Naik, *DNA Switch Boosts Disease Fight*, WALL ST. J., Oct. 25, 2012, at A4.

169. *Hello Mothers, Hello Father*, ECONOMIST, Oct. 27, 2012, at 79, 79–80, cover.

170. See Mark R. Wilson et al., *A Family Exhibiting Heteroplasmy in the Human Mitochondrial DNA Control Region Reveals Both Somatic Mosaicism and Pronounced Segregation of Mitotypes*, 100 HUM. GENETICS 167, 167, 170 (1997), for an analysis of mitochondrial DNA typing of three separate hair root extracts from a single individual. The study concluded that "the degree of heteroplasmy differs from hair to hair." *Id.* at 169. Accordingly, the authors advised that "[d]epending on the situation, if there is an apparent difference of one or two nucleotides between two samples, one should consider the possibility of heteroplasmy. . . . Should evidence exist for a heteroplasmic mixture at such a base or bases, the proper interpretation would be a failure to exclude" the two samples as potentially originating from the same source. *Id.* at 170.

cloning.[171] Currently, prospective parents using *in vitro* fertilization can analyze each pre-embryo for specific genetic diseases, such as Tay Sachs or cystic fibrosis, to choose which to implant if at least one viable pre-embryo is free of the disease. No genes are modified or altered through this procedure, called pre-implantation genetic diagnosis or screening.[172] By contrast, IGM would change the genetic makeup by removing embryonic stem cells from the pre-embryo, altering the cells to create new genes, and eventually implanting the pre-embryo with the modified cells in a woman.[173] The resulting child would have a gene that is absent from both her mother and her father. In the distant future, science may make it possible for prospective parents to assemble a child through synthetically created genes, so theoretically the child's entire genetic makeup might be different from the parents'. Now that J. Craig Venter and his team have assembled a synthetic genome of a simple bacterium that has replicated itself,[174] the possibility of a human genome constructed entirely from synthetic materials, although far in the future, means that a genetic test would be ineffective: such a child could have DNA constructed from a parent's wish list which did not match any living person's DNA.[175] Thus, the main appeal of the genetic test—its certainty—already fails in a variety of cases today and is likely to fail in even more cases as the science progresses.

The use of ART—including *in vitro* fertilization, donated sperm and ova, gestational carriers, and other techniques—has led to a third test: intended parentage. The parent of the child, proponents argue, should be the one who sets the process in motion with the ultimate goal of parenting the child, even if that parent has no genetic connection to the child and did not give birth.[176] The "intended parent" test has long been applied to establish paternity: a man who consented to his wife's use of assisted insemination with donor sperm was considered the father, despite his lack of a genetic tie. Can the intended parent test be used to establish maternity as well? Scholars have noted the arbitrariness of favoring a gestational carrier over the genetic mother through the parturient

171. *Inheritable Genetic Modification Basic Science*, CENTER FOR GENETICS & SOC'Y, http://www.geneticsandsociety.org/article.php?id=286 (last modified June 1, 2006).

172. Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL'Y L. & ETHICS 283, 285 (2008).

173. *Inheritable Genetic Modification Basic Science*, *supra* note 171.

174. Craig Venter, *Watch Me Unveil "Synthetic Life"*, TED: IDEAS WORTH SPREADING (May 2010), http://www.ted.com/talks/craig_venter_unveils_synthetic_life.html.

175. *See generally* Kristine S. Knaplund, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 VAL. U. L. REV. 1361, 1362 (2011) (examining "the practical and regulatory issues that may encourage or inhibit the use of Venter's technology to create synthetic gametes and the legal issues of parentage and inheritance for a synthetically created child").

176. *See, e.g.*, Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002) ("[T]he law should understand intentional parenthood as subsumed by the notion of functional parenthood . . . .").

test.[177] A woman who agreed to carry the child for another person, promising to relinquish the baby on birth, should not be permitted to override her earlier promise; after all, she never would have received the embryo at all but for the earlier agreement.[178] Some see the use of either the genetic or the parturient test as trying to wedge all couples into pre-existing categories, with the paradigm being a married, heterosexual couple, even though many using ART do not fit this model.[179]

Rather than enacting one definition of maternity (such as "the mother is the woman who gives birth"), a wiser course is to enact different presumptions of maternity, similar to those enacted for paternity. For example, states no longer have a conclusive presumption that the birth mother's husband is the father; rather, the husband is a presumed father, but others can avail themselves of the presumption as well.[180] If a husband and wife use *in vitro* fertilization to create a pre-embryo using their genetic material and then hire a gestational carrier who gives birth to the child, the gestational carrier can use the presumption of maternity because she gave birth, while the wife can use a presumption of maternity based on a DNA test.[181] For an intended parent who has no genetic tie to the child, a third presumption is needed, which could be based on the intent of the person to parent the child.[182]

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177. Hill, *supra* note 143, at 399–400 (arguing that no evidence exists to show that a biological or birthing bond is superior to the bonds formed by parents of children with no biological relation, such as by adoption); Shultz, *supra* note 143, at 331–33 (asserting that there is no persuasive basis for preferring the birth mother over the genetic mother).

178. Robertson, *supra* note 145, at 1015; Shultz, *supra* note 143, at 366–67.

179. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 598–99 (2002) ("[R]estrictive policies . . . promise to widen the divide between the myriad forms of the family that exist in society today and the ability of the law to protect the integrity of those families."); *see* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 62 (2004) (arguing that an intent-based test eliminates the distinction between heterosexual and homosexual couples, as well as distinctions between children conceived coitally and those conceived with ART); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1180 (2010) (arguing that heterosexual limitation is unjust because a same-sex couple's child will have only one legal parent, resulting in financial and other deprivations for the child); Kelly M. O'Bryan, Comment, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115, 1143 (2011) ("[N]o [legitimate] reason exists to provide the children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination." (second alteration in original) (quoting *In re* A.B., 818 N.E.2d 126, 131 (Ind. Ct. App. 2004), *vacated sub nom.* King v. S.B., 837 N.E.2d 965 (Ind. 2005)) (internal quotation marks omitted)).

180. *See, e.g.*, UNIF. PARENTAGE ACT § 4(a) (1973) ("A man is presumed to be the natural father of a child if: . . . (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child . . . ."); UNIF. PARENTAGE ACT § 204(a) (2002) ("A man is presumed to be the father of a child if: . . . (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.").

181. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781–82 (Cal. 1993) (in bank) (holding that the genetic mother was the legal mother of the child because it was she who intended to procreate the child).

182. Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005).

If we enact several presumptions of maternity, we face the difficult problem of deciding which presumptive mother prevails. In a gestational carrier case, in which the woman who gives birth is not genetically related to the child, who "wins" will depend on the court's view of the enforceability of the contract: if the agreement is enforceable, the intended mother, not the birth mother, will prevail;[183] if the agreement is not enforceable, the gestational carrier will be the mother.[184]

But how do we resolve switched embryo cases? These are cases in which the woman who gives birth intended to carry her own child, but through a series of events (usually a mistake by the clinic, but it could also occur by design), she is implanted with the wrong embryo.[185] Thus, the birth mother is not a true gestational carrier, but she is also not the genetic mother of the child she bears. Who should prevail? In a 2000 case in New York, for example, the Perry-Rogers' embryo was implanted in Ms. Fasano, along with Ms. Fasano's own embryo; Ms. Fasano subsequently gave birth to two children, one her own genetic child and the other the genetic child of Perry-Rogers.[186] The court acknowledged that a bond could develop with the gestational mother but held that "the suggested existence of a bond is not enough under the present circumstances."[187] Thus, the court sided with the genetic parents (Perry-Rogers) rather than the parturient (Fasano), in part because Fasano learned of the mistake before she gave birth.[188] A 2003 California case involving mistakenly implanted embryos also favored the genetic tie for the father. In *Robert B. v. Susan B.*,[189] Robert and his wife Denise used an anonymously donated egg and Robert's sperm to create an embryo that they intended Denise to carry; however, the embryo was mistakenly implanted in Susan B., an unmarried woman.[190] Rather than deciding that the birth mother had no rights to the child, as the court held in *Perry-Rogers v. Fasano*, this court ruled that, under California law, Susan B. was the presumed mother because she gave birth; Robert could use the genetic tie to argue he is the presumed father; and Robert's wife Denise, who lacked either a gestational or a genetic tie to the child, was not a parent at all.[191]

183. *See* Raftopol v. Ramey, 12 A.3d 783, 793, 804 (Conn. 2011); De Bernardo v. Gregory, No. FA074007658S, 2007 WL 4357736, at *3–4 (Conn. Super. Ct. Nov. 7, 2007); *In re* Baby Boy A., No. A07-452, 2007 WL 4304448, at *6–7 (Minn. Ct. App. Dec. 11, 2007); J.F. v. D.B., 879 N.E.2d 740, 741–42 (Ohio 2007); S.N. v. M.B., 935 N.E.2d 463, 470–71 (Ohio Ct. App. 2010).

184. *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790, 796–97 (Mass. 1998).

185. The State Department warns U.S. couples that "[t]he Department is aware of cases of foreign fertility clinics that have substituted alternate donor sperm and eggs when the U.S. parents' genetic material turned out not to be viable." U.S. Dep't of State, *supra* note 5.

186. Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 21–22 (App. Div. 2000).

187. *Id.* at 26.

188. *Id.* at 26–27. Because Perry-Rogers is African American and Fasano is Caucasian, the decision has been criticized for considering racial bias and sexist factors *sub rosa*. *See* Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 32 (2003).

189. 135 Cal. Rptr. 2d 785 (Ct. App. 2003).

190. *Id.* at 786–87.

191. *Id.* at 789–90.

Genetics may not control if enough time elapses before the genetic parents seek to claim the child. An attempt by the genetic parents for visitation was denied when the trial court found that it was not in the best interests of the children, who were almost fourteen years old.[192]

The overseas mix-ups described in the State Department warning present a more difficult ethical problem. In both *Perry-Rogers v. Fasano* and *Robert B. v. Susan B.*, the genetic parents of the mistakenly implanted embryo could be identified and wanted to claim "their" genetic child. In some cases, however, the implanted embryo may have been created by anonymously donated gametes. The birth mother believes she is carrying her own genetic child but learns otherwise when the State Department requires a blood test. Even if the genetic parents of the child can be found, it is not at all certain that they would want to claim the child as their own. Will this child then be an orphan? If the birth mother is a U.S. citizen, she may be able to transmit citizenship to the child if she meets the residency requirements. If the couple were trying to claim citizenship through the father, however, citizenship would be denied when the blood reveals no tie.

In denying a person's petition to be declared a parent, a court may suggest adoption as an alternative.[193] In *Andres A. v. Judith N.*,[194] for example, a married couple, Luz and Andres, used their gametes to form a pre-embryo, which was implanted in a gestational carrier, Judith.[195] After Judith gave birth to twins, Luz, Andres, Judith, and Judith's husband David sought a declaration that the genetic and intended parents, Luz and Andres, were the children's legal parents.[196] Under New York law, Andres, as the genetic father, could challenge the presumption that the birth mother's husband was the father of the children, but the court was powerless to make a declaration of maternity, and so Judith, the birth mother, remained as the second parent.[197] "The court note[d] that petitioner Luz A. [was] not without a remedy since she [could seek] to adopt the two children."[198] That would have entailed considerable expense and time,[199] as a Massachusetts court observed in another case seeking an uncontested pre-birth order.[200] Requiring the genetic parents to adopt the children

192. Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 515–16 (Ct. App. 2002) ("Simply put, the social relationship established by the Does and their daughters is more important to the children than a genetic relationship with a stranger.").

193. *See, e.g.*, *In re* T.J.S., 16 A.3d 386, 388–89, 398 (N.J. Super. Ct. App. Div. 2011) (finding that, in the case of a child born to gestational carrier with sperm of husband T.J.S. and donated ovum, wife A.L.S. was not the legal mother of her husband's biological child and must adopt).

194. 591 N.Y.S.2d 946 (Fam. Ct. 1992).

195. *Id.* at 947.

196. *Id.* at 947–48.

197. *Id.* at 948–50.

198. *Id.* at 950.

199. Thomas Crampton, *What Marriage Means to Gays: All that Law Allows Others*, N.Y. TIMES, Mar. 30, 2004, at B1 (citing a cost of about $3,000 for an adoption).

200. Culliton v. Beth Isr. Deaconess Med. Ctr., 756 N.E.2d 1133, 1136–38 (Mass. 2001).

born to a gestational carrier would mean that, during the four-day waiting period in that state:

> [t]he duties and responsibilities of parenthood (for example, support and custody) would lie with the gestational carrier for at least four days; the gestational carrier could be free to surrender the children for adoption; and the genetic parents of the children would be forced to go through the adoption process, possibly having to wait as long as six months before becoming the legal parents of the children. As is evident from its provisions, the adoption statute was not intended to resolve parentage issues arising from gestational surrogacy agreements.[201]

In the case of a heterosexual married couple like Luz and Andres in *Andres A.* or the Cullitons, who sought to adopt their own genetic child with the consent of the legal parents, the adoption is likely to be successful but still has drawbacks.[202] The dissenting justices in a 2012 New Jersey case in which the genetic father, his wife, and the gestational carrier all sought a pre-birth order to include the wife (who had no genetic or biological connection to the child) listed some of the disadvantages, calling adoption "a considerable burden . . . on the intended mother."[203] Even though all involved agreed that the wife should be named the child's mother, the adoption process would take two to three months, during which time the child would be "legally motherless."[204] Until the adoption process was completed, the child would not inherit from the wife if she died intestate and would have no claim for benefits such as workers' compensation, social security, and life insurance.[205] For a same-sex couple or a single parent, the process can be much more challenging. Several states have statutes that prohibit unmarried couples or same-sex couples from adopting.[206] In other states, adoption severs the relationship of the

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201. *Id.* at 1138 (citation omitted).

202. *Cf.* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009) (arguing that adoption should not be required for a genetic parent).

203. *In re* T.J.S., 54 A.3d 263, 276–77 (N.J. 2012) (Albin, J., dissenting).

204. *Id.* at 276.

205. *Id.* at 277.

206. FLA. STAT. ANN. § 63.042(3) (LexisNexis 2013) ("No person . . . may adopt if that person is a homosexual."); MISS. CODE ANN. § 93-17-3(5) (2013) ("Adoption by couples of the same gender is prohibited."); UTAH CODE ANN. § 78B-6-117(3) (West 2013) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."). *But see* Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 431–32, 443 (Ark. 2011) (holding that a law prohibiting unmarried cohabitants from adopting violated the Arkansas Constitution); Fla. Dep't of Children & Families v. X.X.G., 45 So. 3d. 79, 91–92 (Fla. Dist. Ct. App. 2010) (holding that the ban violates the Equal Protection Clause of the Florida Constitution). *See also* DAVID M. BRODZINSKY, EVAN B. DONALDSON ADOPTION INST., *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, 3, 20 (Oct. 29, 2003), *available at* http://adoptioninstitute.org/publications/adoption-by-lesbians-and-gays-a-national-survey-of-adoption-agency-policies-practices-and-attitudes/ (summarizing a survey of 307 public and private adoption agencies in 1999 and 2000, which found that about 19% of agencies followed religious beliefs that would reject a gay or lesbian applicant, 8% had policies of placing

child with the biological parents unless the adopting parent is the spouse of the biological parent and thus prevents unmarried couples from being declared parents of the child.[207] For many reasons, adoption is not a practical solution for couples using ART, and thus an equitable means of determining parentage is critical.

In 2008, the Uniform Probate Code (UPC) proposed two amendments to determine parentage in cases in which ART is employed.[208] Section 2-120 applies when no gestational carrier is used, and thus the woman who gives birth intends to be a parent of the child, while Section 2-121 covers parentage when a gestational carrier is used.[209] The new UPC sections incorporate the assumption of the 2000 and 2002 Parentage Acts that a "third party donor" of sperm or eggs is not a parent of the child.[210] If no gestational carrier is involved, the UPC presumes that the woman who gives birth is the mother[211] and that her spouse, or another individual who consented to the ART procedure, is the other parent.[212] If a gestational carrier is used, then UPC Section 2-121 provides that the woman who gives birth is generally *not* presumed to be the mother;[213] instead, the parent–child relationship is created with an intended parent, defined as "an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction."[214]

In the same way that the Uniform Probate Code has recognized that a single definition of "parent" will lead to unjust results if applied both to children conceived coitally and to those conceived using ART, our citizenship rules for children born abroad should acknowledge the different ways in which children are conceived. In 1952, when the current "blood relationship" requirement was adopted by the State Department, sperm banks did not exist[215] and no child had been conceived using *in vitro*

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children only with married couples, and 5% were governed by state law prohibiting placement with lesbians and gays).

207. S.J.L.S. v. T.L.S., 265 S.W.3d 804, 823 n.13 (Ky. Ct. App. 2008) (citing statutes and cases in Nebraska, Oklahoma, North Dakota, Ohio, Wisconsin, Illinois, Georgia, and Tennessee that have "reached our same conclusion" that adoption by the parent's same-sex partner will sever the parent-child relationship with the first parent); *see also In re* T.K.J., 931 P.2d 488, 494 (Colo. App. 1996) (stating that Colo. Rev. Stat. § 19-5-203 regarding stepparent adoptions required the parent seeking to adopt to be married to the child's parent, and thus unmarried lesbian partners could not adopt each other's children).

208. *See generally* Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30, 32 (2009).

209. UNIF. PROBATE CODE §§ 2-120 to 2-121 (2010).

210. *Id.* § 2-120(b).

211. *Id.* § 2-120(c).

212. *Id.* § 2-120(d), (f).

213. *Id.* § 2-121(c).

214. *Id.* § 2-121(a)(4).

215. Dr. Jerome Sherman created the world's first sperm bank in Iowa City, Iowa in 1952. Alexis C. Madrigal, *The Surprising Birthplace of the First Sperm Bank*, ATLANTIC (Apr. 28, 2014,

fertilization.[216] Now that children can be conceived in a variety of ways, the State Department regulations can mean that an ART child is not only denied U.S. citizenship but, depending on the law of the country in which the child is born, also stateless.

CONCLUSION

Unlike the ancient Greeks and Romans, we now know (or we *think* we know) how a child is created: by the mixing of genes contributed by both a man and a woman, and the nourishment of the resulting pre-embryo in a woman's womb. In the vast majority of cases, the woman who nurtures and gives birth to the child is the genetic as well as the intended mother. All three tests of parentage—parturient, genetic, and intent—work equally well to determine maternity since they all lead to the same woman. The problem arises when ART is used to conceive a child. The parturient may not be the genetic mother of the child if a donated egg or embryo is used in conception. The parturient may not be the intended mother of the child if she is a gestational carrier.

The State Department's definition of a parent as solely the genetic contributor is out of step with current American law. It is contrary to its origins in Roman law, which regarded the parturient as something akin to a gestational carrier: someone who nurtured the child but not one who determined its genetic makeup. It is also out of step with centuries of family law, in which a pure genetic connection was not the sole determinant of paternity. The husband of a married woman might be declared the child's father even though he had no blood relationship with the child; the companion of an unmarried woman might not be declared the child's father, even after proving the genetic connection, unless he acted as a father in some way.

In late 2013, the State Department changed its interpretation of INA sections 301 and 309 to recognize egg donations. While the prior posting on the Department of State informational page stated, "[T]he U.S. citizen parent must be the sperm or the egg donor in order to transmit U.S. citizenship to a child conceived through ART,"[217] their webpage "Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad" now states, "[A] U.S. citizen mother

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11:59 EST), http://www.theatlantic.com/technology/archive/2014/04/how-the-first-sperm-bank-began/361288/.

216. Louise Brown, the first child born using in vitro fertilization, was born in 1978. James Gallagher, *Five Millionth 'Test Tube Baby,'* BBC NEWS, http://www.bbc.co.uk/news/health-18649582?print=true (last updated July 1, 2012, 21:22 EST) (noting that the first such child, Louise Brown, was born in the UK in July 1978, and that, since then, about five million babies have been born using the technology).

217. U.S. Dep't of State, *Important Information for U.S. Citizens Considering the Use of Assisted Reproductive Technology (ART) Abroad*, WAYBACK MACHINE (Oct. 29, 2013), http://web.archive.org/web/20131029203440/http:/travel.state.gov/law/citizenship/citizenship_5177.html.

must be either the genetic or the gestational and legal mother of the child at the time and place of the child's birth. (A gestational mother is the woman who carries and gives birth to the child.)"[218] This is a good beginning, since it allows an American woman using a donated embryo to secure American citizenship for the child she bears, even though she has no genetic connection to the child. But much more is needed. First, the INA sections 301 and 309 need to be amended to reflect this new policy, and to make clear that children born before the policy change can apply retroactively for American citizenship. Second, the new interpretation covers children conceived with donated ova, but not children conceived with donated sperm. The Department of State still requires, *inter alia*,[219] that the U.S. citizen father is the child's genetic parent in order for the child to obtain American citizenship at birth through the father.

By focusing on just one factor—the blood relationship—the State Department's policy of *jus sanguinis* forces us to examine the essential attributes of parentage. Rather than articulating one test for all cases, the rules for bestowing citizenship at birth should be amended to provide for those conceived through ART, by allowing several presumptions of parentage to apply. The Uniform Probate Code amendments provide an excellent template with which to begin.

218. U.S. Dep't of State, *supra* note 5.

219. In addition to being the genetic parent, the U.S. citizen parent must meet certain residency requirements to transmit American citizenship to the child.

JANUS CAPITAL GROUP, INC. V. FIRST DERIVATIVE TRADERS: THE CULMINATION OF THE SUPREME COURT'S EVOLUTION FROM LIBERAL TO REACTIONARY IN RULE 10B-5 ACTIONS

CHARLES W. MURDOCK†

ABSTRACT

"Political" decisions such as *Citizens United* and *National Federation of Independent Business* (Obamacare) reflect the reactionary bent of several Supreme Court Justices. But this reactionary trend is discernible in other areas as well. With regard to Rule 10b-5, the Court has handed down a series of decisions that could be grouped into four trilogies. The Article examines the trend over the past forty years which has become increasingly conservative and, finally, reactionary.

The first trilogy was a liberal one, arguably overextending the scope of Rule 10b-5. This was followed by a conservative trilogy that put a brake on such extension, but did so in a jurisprudentially sound manner. The next trilogy, dealing with insider trading, regressed Rule 10b-5 analysis back to a common law perspective. This was ironic since the securities laws were enacted because of the inadequacy of the common law.

The final trilogy is unquestionably reactionary. Precedent is disregarded and the Court, in constraining the scope of Rule 10b-5, fails to hold accountable clearly wrongful conduct such as conspiring to inflate a corporation's earnings or making false representations in prospectuses. In so doing, the Court characterizes a conspiracy to inflate the earnings of a corporation as an "ordinary course transaction" taking place in the "marketplace for goods and services" and adopts a definition of "making" a statement that exculpates the person who drafted the statement and was the only person who knew the statement was false.

Consequently, the conclusion asserts that the Court is less interested in protecting investors and more interested in constraining the scope of Rule 10b-5, and asserts the need for Congress to reinstate aiding and abetting liability in private securities fraud litigation. Such action by Congress will reverse not just *Central Bank* but also *Stoneridge* and *Ja-*

† Professor of Law, Loyola University Chicago. I would like to express my appreciation for their helpful comments to Patricia O'Hara, Professor of Law at Notre Dame, and David Ruder, Professor of Law at Northwestern University and Former Chairman, Securities and Exchange Commission. Professor Ruder pointed out that, with class actions, an expansive approach to Rule 10 b-5 could potentially impose ruinous liability on an issuer. I concur. But *Central Bank* and its progeny can create a "what, me worry" attitude. The best way to avoid liability is to tell the truth. Unfortunately, in business, as in politics, truthfulness is sometimes a forgotten virtue.

nus Capital, which supposedly were mandated by the Supreme Court's decision in *Central Bank*.

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INTRODUCTION

It is surprising that the United States Supreme Court would occupy center stage in the midst of a presidential campaign. Yet, as the end of its 2012 term approached, the anticipated decision in *National Federation of Independent Business v. Sebelius*[1] preoccupied the media.[2] To the surprise of many, Chief Justice Roberts switched from the "conservative" block to join the four "liberals" in upholding the Affordable Care Act.[3] Although the mandate in the Act requiring those who could afford insurance to do so or pay a penalty was upheld as a tax, Justice Roberts determined that the federal government could not support the mandate under the Commerce Clause,[4] nor could the federal government require the states to expand Medicare coverage or else lose their existing Medicare funding.[5] Thus, his decision hardly reflected a conversion to the liberal wing of the Court.

At the same time, *Citizens United v. Federal Election Commission*[6] again became topical as millions of dollars of political advertisements flooded the media.[7] *Citizens United* curtailed the power of the federal government to limit political donations[8] and, in the current term, the Court also limited the power of the states to do so.[9] While the Roberts

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1. 132 S. Ct. 2566 (2012).

2. *See* Linda P. Campbell, Editorial, *Decision Day for Health Care Law*, PITTSBURGH POST-GAZETTE, June 22, 2012, at A7 (discussing the media's repeated attempts to gain access for TV cameras to record the Court's opinion announcements); Ann Gerhart, *Nothing to Do but Wait for Court Decision*, WASH. POST, June 25, 2012, at C1 (discussing the strong interest in the court's ruling in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, including members of the media); Michael Grillo & Kristin Stoller, *13K Tweets a Minute After Law Upheld Health Care Ruling*, HARTFORD COURANT, June 29, 2012, at A4 (noting that all news organizations were anxiously waiting the Court's decision, leading to several releasing incorrect information before they understood the actual result).

3. *Sebelius*, 132 S. Ct. at 2601 ("[The mandate] is therefore constitutional, because it can reasonably be read as a tax."); *see also* Richard A. Epstein, Op-Ed., *A Confused Opinion*, N.Y. TIMES, June 29, 2012, at A25 (noting "[t]he stunner yesterday was that Chief Justice John G. Roberts Jr., [was] joined by the Supreme Court's four most liberal justices . . . ."); Martine Powers, *Morning of Tension Is Broken by Cheers*, BOS. GLOBE, June 29, 2012, at A, *available at* http://www.boston.com/news/nation/articles/2012/06/29/harvard_law_professors_students_cheer_supreme_court_decision_on_health_care_act/ (discussing the surprise felt by all when learning that Justice Roberts upheld the Affordable Care Act).

4. *Sebelius*, 132 S. Ct. at 2591.

5. *Id.* at 2607.

6. 558 U.S. 310 (2010).

7. *See* Matt Bai, *How Did Political Money Get This Loud?*, N.Y. TIMES MAG., July 22, 2012, at MM14 (discussing the impact of *Citizens United* on political fundraising); Richard L. Hasen, *The Numbers Don't Lie*, SLATE (Mar. 12, 2012), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html (noting that in the 2012 election season through March 8, total spending was 234 percent higher than 2008's numbers and 628 percent higher than 2004's numbers).

8. *See Citizens United*, 558 U.S. at 365–66.

9. *See* Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2491 (2012) (per curiam) (stating that the holding from *Citizens United* clearly applies to state law).

Court is often referred to as conservative, arguably it might be more accurately described as reactionary or libertarian. "Libertarian" is the term George Will, a conservative pundit, has applied to Justice Kennedy, the so-called swing vote.[10]

These decisions, though highly significant, arguably involved "political" issues, rather than moral and ethical issues, that is, those that involve whether or not certain conduct is wrongful. However, the reactionary shift of the court is visible in these areas as well.

Consider Securities and Exchange Commission Rule 10b-5, which embraces the ethic of the securities laws that it is "sinful" not just to lie, but to tell half-truths as well.[11] The private cause of action under Rule 10b-5 was judicially adopted in the 1946 case of *Kardon v. National Gypsum Co.*[12] Over twenty years passed before the Supreme Court opined upon Rule 10b-5 and, during that period, lower courts took an expansive view of its scope to remedy a broad range of wrongdoing. The initial approach of the Supreme Court to Rule 10b-5 was a "liberal" one, but over time the approach became more conservative.

A little over a year ago, the Supreme Court, in *Janus Capital Group, Inc. v. First Derivative Traders*,[13] decided the third case in a trilogy of decisions that are unique both in their dubious jurisprudence and the willingness of the Court to adopt an interpretation of the law that permitted clearly wrongful conduct to go unpunished. Accountability for wrongful conduct is no longer a serious jurisprudential consideration for the Roberts Court. Since the Supreme Court ventured into the Rule 10b-5 domain in 1969, it has handed down several decisions that can be grouped into a series of trilogies.

The first trilogy was a liberal one that expanded the scope of Rule 10b-5,[14] while the second trilogy was a conservative one that put the brakes on such expansion.[15] This latter trilogy embodied sound policy and thoughtful jurisprudence, although *Blue Chip Stamps v. Manor Drug Stores*[16] did not reflect judicial restraint—at this point a bellwether of conservative judicial philosophy. But then came two trilogies, supposedly conservative, that were characterized by sloppy reasoning and an out-

10. *See* Lucas Grindley, *George Will Predicts Win for Marriage Equality in Supreme Court*, ADVOCATE.COM (July 2, 2012, 12:48 AM ET), http://www.advocate.com/politics/marriage-equality/2012/07/02/george-will-predicts-win-marriage-equality-supreme-court (quoting George Will as saying, "I think [Justice Kennedy is] . . . driven in both directions by a constant compass and that is he's a libertarian" (internal quotation mark omitted)).

11. *See* SEC Rule 10b-5, 17 C.F.R. § 240.10b-5(b) (2013) (making it a violation to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading").

12. 69 F. Supp. 512, 513–14 (E.D. Pa. 1946).

13. 131 S. Ct. 2296 (2011).

14. *See infra* Part I.A.

15. *See infra* Part I.B.

16. 421 U.S. 723 (1975).

come-determinative approach to judicial decision making. The third trilogy dealt with insider trading[17] and the fourth, and current, trilogy with the potential liability of those who might be characterized as "collateral participants" in fraud.[18] Sadly, these latter two trilogies had the effect of insulating corporate corruption from liability and undermining the investor protection that was the goal of the securities acts.

The first decision in the fourth trilogy, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[19] eliminated secondary liability for aiding and abetting under the securities laws.[20] Congress responded by reinstating aiding and abetting liability in enforcement actions brought by the Securities Exchange Commission (SEC).[21] The second decision, *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*,[22] though it arguably involved primary liability, rejected a cause of action against those who conspired with their customer to inflate the customer's earnings.[23] Supposedly the Supreme Court was constrained by the *Central Bank* decision. The third and current decision, *Janus Capital*, insulated an asset management firm and its investment advisor subsidiary from liability for misrepresentations made by a mutual fund it sponsored.[24] The Court's ill-reasoned analysis as to who "makes" a misrepresentation has far-reaching implications, and the logic of its decision could insulate corporate management, other than directors, from liability for fraudulent representations the corporation makes affecting securities markets.

Part I of this Article traces the evolution of Rule 10b-5 from its origin and development in the lower courts until the Supreme Court's initial venture into the Rule 10b-5 thicket, in which the court facilitated the expansion of Rule 10b-5 litigation, arguably beyond reasonable boundaries. Part II then reviews the second trilogy in which the Court, moving in a conservative direction after appointments by President Nixon, placed a series of constraints upon the ability to bring a Rule 10b-5 action, employing a well-reasoned perspective that took into account the other provisions of the securities laws. Part III analyzes the third trilogy which, rather than putting a brake upon unwarranted expansion of Rule 10b-5, involved undercutting the essential purposes of the securities laws to provide a fair playing field for investors—and regressed the analysis of securities litigation to a common-law perspective, even though the securities laws were enacted because the common law was inadequate to

17. *See infra* Part III.
18. *See infra* Part IV.
19. 511 U.S. 164 (1994).
20. *Id.* at 184–85.
21. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 1995 U.S.C.C.A.N. (109 Stat.) 737.
22. 552 U.S. 148 (2008).
23. *Id.* at 159.
24. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011).

deal with securities fraud. Part IV of the Article then focuses upon the liability of what are arguably collateral participants, that is, persons who are not the primary wrongdoer but rather assist or conspire with the primary wrongdoer. This is a critical area since the primary wrongdoer, by the time the fraud is uncovered, is often insolvent or otherwise unable to make whole the investors injured by the fraud. In addition, collateral participants are often "gatekeepers" upon whom the public relies to ensure that issuers are responsible and accountable.

The tragedy of the decisions comprising the fourth trilogy is that, even though the existence of wrongdoing is unquestioned, the Supreme Court opted to let the wrongdoers go unpunished and extended similar protection to subsequent generations of wrongdoers. Part IV first examines the unparalleled judicial activism reflected in the *Central Bank* decision. It then examines how the Court twisted well-settled principles of law in an outcome-determinative mode of judicial decision making. *Central Bank* appeared to leave the door ajar when, arguably, those assisting the primary wrongdoer were so directly involved in the fraud that they could be considered primary wrongdoers themselves. But, in *Stoneridge Investment Partners*, an unnecessary extension of *Central Bank*, the Court again twisted logic in holding that a conspiracy with suppliers to inflate earnings did not impact investors.

Finally, Part IV analyzes the impact of *Janus Capital*. Superficially, the decision involves a limited issue: the responsibility of an asset manager for misrepresentations made by its captive mutual fund. However, by markedly narrowing the concept of who "makes" a misrepresentation, the decision could have far-reaching, untoward consequences. For example, the district court in the Enron litigation found that the attorneys for Enron, who knowingly drafted false disclosure documents, could be liable for "making" a misrepresentation. This analysis would now be foreclosed by the *Janus Capital* decision.

The Conclusion asserts that the Supreme Court was fully aware of the wrongdoing involved in *Stoneridge Investment Partners* and *Janus Capital*, and the impact of its decisions. Thus, the conclusion is inescapable that the Supreme Court is more concerned with constraining the scope of the securities laws than curtailing corporate fraud. The result is diminished protection for the investing public. It is also clear that the Court is not acting as an umpire,[25] dispassionately applying well-settled law in the cases that come before it, but rather unsettling established law

25. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 55 (2005) (statement of John G. Roberts, Chief Justice nominee), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html ("Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them.").

in a reactionary fashion to undermine the basic principles undergirding the securities laws.

I. A BRIEF HISTORY OF THE EVOLUTION OF RULE 10B-5

A. The Growth of a Little Acorn into a Massive Oak Tree

Rule 10b-5 was promulgated in 1942[26] pursuant to Section 10 of the 1934 Securities Exchange Act.[27] By its terms, it defines certain manipulative or deceptive conduct as illegal and, thus, could be the basis for a SEC enforcement action[28] or criminal prosecution by U.S. Attorneys.[29] It was not until 1946, in *Kardon v. National Gypsum Co.*,[30] that a federal court implied a private course of action based upon Rule 10b-5. What is striking about the opinion is its brevity and curt analysis. Based upon the analogy to a statutory tort, the *Kardon* court accepted as basically self-evident the judicial principle that a rule defining illegality could establish a duty, the breach of which could give rise to a civil cause of action.[31]

After the *Kardon* decision, litigation premised upon Rule 10b-5 figuratively exploded. While courts frequently struggled to find deception,[32] many of these cases involved conduct that could be characterized as a breach of fiduciary duty.[33] Thus, some commentators questioned whether a federal law of corporations was developing.[34]

The apogee of the development of Rule 10b-5 occurred in 1968 in the Texas Gulf Sulphur litigation. In an enforcement action, *SEC v. Tex-*

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26. Securities and Exchange Commission, 13 Fed. Reg. 8177 (Dec. 22, 1948) (codified at 17 C.F.R. § 240.10b-5(b) (2013)).

27. *See* 15 U.S.C. § 78j (2012).

28. *See id.*

29. *See id.*

30. 69 F. Supp. 512 (E.D. Pa. 1946).

31. *Id.* at 513–14.

32. *See, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 463 (1977) (holding that deception is required for a violation of Rule 10b-5); Kademian v. Ladish Co., 792 F.2d 614, 622 (7th Cir. 1986) (dismissing, after extensive analysis of whether defendants deceived the plaintiffs, the 10b-5 claims for lack of manipulation or deception); Madison Consultants v. Fed. Deposit Ins. Corp., 710 F.2d 57, 61–62 (2d Cir. 1983) (providing that alleged wrongful removal of a restrictive legend on a stock issuance was not a cause of action under Rule 10b-5 because plaintiffs alleged no manipulation or deception).

33. *See, e.g.*, Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971), (holding that an investment advisor corporation that realized profits in connection with the appointment of a new advisor upon its recommendation violated its fiduciary duty, thereby violating the Investment Company Act), *superseded by statute*, Investment Company Act of 1940, 15 U.S.C. § 80a-15(f) (1975), *as recognized in* Meyer v. Oppenheimer Mgmt. Corp., 895 F.2d 861, 865 (2d Cir. 1990); Schein v. Chasen, 478 F.2d 817, 823 (2d Cir. 1973) (stating that while a breach of fiduciary duty usually leads to recourse through state laws, such a breach can also lead to a federal cause of action under Rule 10b-5), *vacated*, Lehman Bros. v. Schein, 416 U.S. 386 (1974); Slavin v. Germantown Fire Ins. Co., 174 F.2d 799, 814 (3d Cir. 1949) (stating that the court need not find a breach of a fiduciary duty to find liability under federal securities laws, but such a breach can be sufficient in showing a violation).

34. *See, e.g.*, Arthur Fleischer, Jr., *"Federal Corporation Law": An Assessment*, 78 HARV. L. REV. 1146, 1146–47 (1965); Stanley A. Kaplan, *Corporation Law and Securities Regulation*, 18 BUS. LAW. 868, 868 (1963); Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 COLUM. L. REV. 1793, 1794 (2006).

as Gulf Sulphur Co.,[35] the Second Circuit examined the conduct surrounding the discovery by Texas Gulf Sulphur of a rich ore deposit in Timmins, Canada.[36] "Act I" encompassed the period from the drilling of a core in November 1963 until April 1964.[37] During this period, corporate employees and directors purchased Texas Gulf Sulphur stock on the open market.[38] "Act II" began in early April 1964, when rumors that the ore strike was extraordinary began circulating; in response, the company issued what has been characterized either as a "gloomy" or a "misleading" press release on April 12, 1964 and four days later, announced the extraordinary nature of the find.[39]

With regard to Act I, the Second Circuit determined that employees, even low-level employees, who purchased stock, were "insider[s]" who could not trade on "inside information," namely material non-public information,[40] but rather had a duty to "disclose . . . or . . . abstain."[41] In Act II, in determining that the company was liable for the misleading press release, the court essentially employed a negligence standard.[42] And, in defining materiality, the court vacillated between information that a reasonable investor *might*[43] consider important versus *would*[44] consider important. While the case was an enforcement action, it spawned a series of private damages actions.[45]

Texas Gulf Sulphur was foreshadowed by an SEC decision authored by former Columbia Law Professor William Cary, and then-SEC Chairman, *In re Cady, Roberts & Co.*[46] That case was a "bad news" situation: Curtiss–Wright's Board of Directors had decided to cut the dividend. In such a situation, someone with foreknowledge might seek to sell Curtiss–Wright stock. A board member, thinking that the corporate secretary had earlier disseminated the information to the public,[47] telephoned a fellow partner at Cady Roberts who then sold the stock.

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35. 401 F.2d 833 (2d Cir. 1968).
36. *Id.* at 839–40.
37. *Id.* at 843–45.
38. *Id.* at 844.
39. *Id.* at 845–47 (internal quotation marks omitted).
40. *Id.* at 848 (internal quotation marks omitted).
41. *Id.*
42. *Id.* at 862–63. This position was reversed in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), discussed *infra* Part II.B.
43. *Tex. Gulf*, 401 F.2d at 860.
44. *Id.* at 863. The Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), adopted the would/probability standard.
45. *See, e.g.*, Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228, 241 (2d Cir. 1974) (holding insiders liable directly to plaintiffs that purchased stock on the open market without knowledge of the material inside information); Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 562 (E.D.N.Y. 1971) (allowing civil liability in a class action based on material misstatements and omissions contained in a registration statement).
46. Cady, Roberts & Co., Exchange Act Release No. 6668, 1961 WL 60638 (Nov. 8, 1961). *See* discussion *infra* note 201.
47. *Cady, Roberts & Co.*, 1961 WL 60638, at *2.

The Commission disciplined the partner who sold and its opinion is significant in several respects. First, the partner back at the office who sold stock (the "tippee") had no connection to Curtiss–Wright.[48] Second, the "tipper," the director, did not know that dissemination of the information had been delayed and thus did not "sin," a fact that the Supreme Court, in the *Dirks v. SEC*[49] case, did not appreciate.[50] Most importantly, because this was a bad news situation, the insider would be selling to a buyer who very likely was not a shareholder.[51] Contrast this with a "good news" situation in which the insider would seek to buy stock: the only person from whom the insider could buy stock would be a shareholder to whom a corporate insider arguably would owe a fiduciary duty.[52] The defendant argued that no duty was owed to a non-shareholder to whom the stock was sold, but the Commission made short shrift of this argument by asserting that the securities laws were enacted because the common law was inadequate to protect investors.[53] Thus, the absence of a common law duty was irrelevant to whether there was a violation of the securities laws—a proposition that the Supreme Court, in *Chiarella v. United States*,[54] declined to follow.[55]

B. The First Trilogy: The Supreme Court's Belated Role in Expanding the Scope of Rule 10b-5

1. *National Securities*: The Supreme Court's Initial Foray into Rule 10b-5

Over twenty years passed between the judicial recognition of a private cause of action under Rule 10b-5 in *Kardon* and the Supreme Court's initial consideration of this cause of action in *SEC v. National Securities, Inc.*[56] As the Court noted, "[a]lthough § 10(b) and Rule 10b-5 may well be the most litigated provisions in the federal securities laws, this is the first time this Court has found it necessary to interpret them."[57] The *National Securities* Court then asserted a caution that the Court, as

48. *Id.*

49. 463 U.S. 646 (1983).

50. *See id.* at 665–67 (holding that the "tippee" only sins if the "tipper" sinned, meaning the defendant who received inside information from an insider who did not personally benefit from the disclosure was not liable under Rule 10b-5).

51. In "bad news" cases, the insider knows about some impending harm to the company, meaning the stock price will fall in the future. Here, the insider sells stock, and the buyer of that stock generally did not already own stock in that company. While a current stockholder can always buy more stock, it will often be someone without any current ownership of the company.

52. *See* Goodwin v. Agassiz, 186 N.E. 659, 661 (Mass. 1933) (holding, in a "good news" case, that directors had no duty to disclose their identity, or the good news, when buying shares from a current stockholder).

53. *Cady, Roberts & Co.*, 1961 WL 60638, at *5.

54. 445 U.S. 222 (1980).

55. *See id.* at 236 (holding that the defendant, who was not a corporate insider, could not be liable for trading on material, nonpublic information because the "outsider" owed no duty to the shareholders, meaning no duty was owed to the plaintiffs).

56. 393 U.S. 453 (1969).

57. *Id.* at 465.

constituted subsequent to 1980, should have heeded: "The questions presented are narrow ones. They arise in an area where glib generalizations and unthinking abstractions are major occupational hazards."[58]

The primary issue in the *National Securities* case was whether the approval of a merger by the Arizona Director of Insurance precluded an action by the SEC to set aside the merger on the ground that its approval had been procured by a misleading proxy statement.[59] The defendants argued that such action by the SEC would supersede state law regulating the business of insurance in violation of the McCarran–Ferguson Act.[60] The Court concluded that "[t]he paramount federal interest in protecting shareholders is in this situation perfectly compatible with the paramount state interest in protecting policy holders."[61]

The Ninth Circuit had affirmed judgment on the pleadings in favor of defendants on the basis that McCarran–Ferguson Act barred the SEC action.[62] However, defendants had also argued below that a merger did not constitute a "purchase or sale" under Rule 10b-5, and that Rule 10b-5 would not apply to misrepresentations in connection with a proxy notification.[63] While these issues were not directly before the Court, it "reached" to provide guidance to the trial court on remand.

The Court made short shrift of both arguments. With respect to the purchase or sale issue, the Court rejected the "no sale" argument premised upon the former Rule 133[64] and determined that a merger did constitute a sale for purpose of Rule 10b-5. The Court stated:

> Whatever the terms "purchase" and "sale" may mean in other contexts, here an alleged deception has affected individual shareholders' decisions in a way not at all unlike that involved in a typical cash sale

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58. *Id.*

59. *Id.* at 455–56.

60. *Id.* at 456; *see* 15 U.S.C. § 1012(b) (2012) (stating that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .").

61. *Nat'l Sec., Inc.*, 393 U.S. at 463. The Court also stated:

> The gravamen of the complaint was the misrepresentation, not the merger. The merger became relevant only insofar as it was necessary to attack it in order to undo the harm caused by the alleged deception. Presumably, full disclosure would have avoided the particular Rule 10b-5 violations alleged in the complaint. Nevertheless, respondents contend that any attempt to interfere with a merger approved by state insurance officials would "invalidate, impair, or supersede" the state insurance laws made paramount by the McCarran-Ferguson Act. We cannot accept this overly broad restriction on federal power.

Id. at 462–63.

62. *Id.* at 456.

63. *Id.* at 464–65 (internal quotation marks omitted).

64. Former Rule 133 provided that certain transactions, such as mergers, did not involve a "sale" under the 1933 Act, and thus the stock issued in the transaction did not need to be registered with the SEC prior to sale. Registration of Certain Transactions Involving Merges, Consolidations and Acquisitions of Assets, 37 Fed. Reg. 23631 (Nov. 7, 1972) (rescinding 17 C.F.R. § 230.133 (1968)).

> or share exchange. The broad antifraud purposes of the statute and the rule would clearly be furthered by their application to this type of situation. Therefore we conclude that Producers' shareholders "purchased" shares in the new company by exchanging them for their old stock.[65]

The Court also determined to dismiss rather quickly the argument that Rule 10b-5 did not cover misrepresentations in proxy material.[66] Even though an insurance company might be exempt from federal proxy regulation, "Congress may well have concluded that the Commission's general antifraud powers over purchases and sales of securities should continue to apply to insurance securities."[67] The approach of the Court suggests a presumption in favor of expanding the coverage of Rule 10b-5 to prevent fraud, rather than restricting the scope of Rule 10b-5 to facilitate fraud.

At this stage, the Supreme Court was not only comfortable with the development of Rule 10b-5 by the lower courts but also focused upon an expansive interpretation of Rule 10b-5 to further the anti-fraud purposes of the securities acts.

2. *Bankers Life*: The Apogee of Supreme Court Expansion of Rule 10b-5

Superintendent of Insurance of the State of New York v. Bankers Life & Casualty Co.[68] was a very short and superficial opinion dealing with a very complicated set of facts.[69] In effect, a crook, Begole, purchased all the stock of Manhattan Casualty Co. for $5 million.[70] Begole and other conspirators then caused Manhattan Casualty to sell U.S. Treasury bonds for approximately $5 million and appropriated the proceeds to pay Bankers Life the $5 million purchase price.[71] Plaintiff brought suit as liquidator of the assets of Manhattan Casualty.

The Second Circuit, in affirming the dismissal, stated that "no investor [was] injured" and that "[t]he purity of the security transaction and the purity of the trading process were unsullied."[72] The facts would seem to support the Second Circuit's reasoning. Bankers Life sold the shares of its subsidiary for $5 million. In fact, Bankers Life received $5 million, apparently what the shares were worth. Therefore, there was no fraud in the purchase of the Manhattan stock. With respect to the sale of bonds by

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65. *Nat'l Sec., Inc.*, 393 U.S. at 467.
66. *Id.* at 468.
67. *Id.* at 468–69.
68. 404 U.S. 6 (1971).
69. *Id.* at 7–9.
70. *Id.* at 7–8.
71. *Id.* at 8.
72. Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 430 F.2d 355, 361 (2d Cir. 1970), *rev'd*, 404 U.S. 6 (1971).

Manhattan, apparently the bonds were worth what the buyer of the bonds paid. Thus the buyer of the bonds was not defrauded. Moreover, since the bonds were worth what Manhattan sold them for, Manhattan was not defrauded in the bond transaction *itself.* What happened was that the proceeds of the sale, instead of being deposited in Manhattan Casualty's bank account, were misappropriated by the crooks.

The factor that enabled the Supreme Court to treat this as a securities case was that the asset that was sold was a financial asset, namely, Treasury bonds. If, instead of being a Treasury bond, the circumstances were the same except that the company whose stock was purchased was a construction company and the asset sold was a large crane, this is no way could be conjured to be a securities case.

In the case at bar, as the Second Circuit Court observed, no investor was injured. This was a situation in which crooks embezzled from a company they owned. The company became bankrupt and the state agency sought to recover the embezzled funds. No one was deceived about the value of any security. Each party to both of the securities transactions received the price that each sought. It was a real stretch to treat this as a securities case.

The Supreme Court acknowledged that, "[t]o be sure, the full market price was paid for those bonds."[73] However, the Court added: "but the seller was duped into believing that it, the seller, would receive the proceeds."[74] The Court, understandably, was concerned that there was an act "which operated as 'a fraud or deceit' on Manhattan."[75] But, embezzling the proceeds of the sale of a crane would also be a fraud or deceit. However, it is not a securities fraud. This was a suit on behalf of creditors of a corporation to recover funds embezzled by the owner of a corporation. Cases such as this engendered concern about the development of a federal law of corporations and about whether the fraud was "in connection with" a securities transaction, as discussed below.

The Court stated that "Manhattan was injured as an investor through a deceptive device which deprived it of any compensation for the sale of its valuable block of securities"[76] and that "[t]he Act protects corporations as well as individuals who are sellers of a security."[77] But the injury here was not the typical injury that a defrauded investor would suffer. Both the buyer and the seller were happy with the price. Manhattan Casualty's injury occurred when the proceeds were misappropriated.[78]

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73. *Bankers Life*, 404 U.S. at 9.
74. *Id.*
75. *Id.*
76. *Id.* at 10.
77. *Id.*
78. The Court later recognized a related theory on which to find violations of federal securities laws, which it termed the "misappropriation theory." *See* United States v. O'Hagan, 521 U.S.

Moreover, Manhattan Casualty was a unique corporate investor. It was not injured in a transaction involving its own equity securities, as in *Pappas v. Moss*.[79] Rather, it was, in effect, selling part of its "inventory," since the "inventory" of a financial institution in part consists of securities. As stated above, if Manhattan Casualty were a construction company and sold its crane, this would not have been a Rule 10b-5 case. As also stated above, the "investor," Manhattan Casualty, was not complaining about the price received in the transaction.

The opinion contained other expansive language. The fact that the fraud was committed by an officer, therefore breaching his fiduciary duty to Manhattan, was "irrelevant" since § 10(b) bars fraud by "any person."[80] Also irrelevant was the fact that this was a private transaction, i.e., one not conducted over an exchange or in the formal over-the-counter market and that the proceeds were "misappropriated."[81]

The Court did realize that there must be some connection between the fraud and a securities transaction, since the Court acknowledged "that Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement."[82] But the Court provided little guidance as to when fraud is "in connection with" a securities transaction when it held that Manhattan's injury was the result of "deceptive practices *touching* its sale of securities as an investor."[83] "Touching" is not a very precise legal standard.

Looking ahead to the next trilogy,[84] the opinion would have been sounder if it would have held that Manhattan Casualty was not deceived since its sole shareholder, who controlled the board of directors, was the perpetrator of the misappropriation of the proceeds of sale. Instead, it created a tenuous connection between the fraud and the securities transaction, a connection even more tenuous than that which exists in insider

642, 652–53 (1997) (internal quotation marks omitted). In a case dealing with insider trading, the Court found that a lawyer who traded on secret information he obtained while working for the corporation could be liable under Rule 10b-5. *Id.* at 653. Even though no harm was caused to those selling to the insider, the Court found that the lawyer misappropriated information from his employer, making him liable under Rule 10b-5. *Id.* at 653–54.

79. 393 F.2d 865 (3d Cir. 1968). In *Pappas*, the board of directors voted to sell shares of the corporation to themselves at a price far below market value. *Id.* at 867. The Third Circuit found that this sale violated Rule 10b-5 because the board of directors deceived the independent shareholders by selling stock cheaply to themselves. *Id.* at 869. The corporation itself was harmed because the board of directors acted against the interest of the corporation by improperly selling securities, which is different from misappropriating the assets of the corporation.

80. *Bankers Life*, 404 U.S. at 10 (internal quotation marks omitted).

81. *Id.*

82. *Id.* at 12.

83. *Id.* at 12–13 (emphasis added).

84. *See infra* Part II (discussing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), as one of the trilogy's conservative decisions limiting the scope of Rule 10b-5 in Part II.C).

trading under the misappropriation theory, which will be explored in connection with the third trilogy.[85]

The result reached by the *Bankers Life* Court was not necessarily dictated by the language of the statute, by existing case law, or by the facts of the case, and could be criticized as being overly expansive in its view of Rule 10b-5. However, in contrast to the latest trilogy, the *Bankers Life* Court caused little disruption to existing statutory interpretation and was not diametrically inconsistent with existing case law.[86]

3. *Affiliated Ute Citizens*: Engendering Unnecessary Confusion

Affiliated Ute Citizens of Utah v. United States[87] once again dealt with a complicated set of facts but unfortunately did so, not in a short opinion, but rather in an unnecessarily long one. In *Affiliated Ute Citizens*, a bank was appointed transfer agent for mixed-blood Indians with regard to stock they owned in a corporation formed to hold assets for which distribution would otherwise be impracticable.[88] These assets included transferred oil, gas and mineral rights, and unliquidated claims against the U.S. government, pursuant to the Ute Indian Supervision Termination Act.[89] Each mixed-blood Ute was to receive ten shares of Ute Distribution Corp. (UDC) stock; however, instead of distributing the shares directly to the mixed-bloods, UDC deposited the shares with the bank and the bank issued receipts to the shareholders.[90]

The primary focus of the litigation was the sale by eighty-five mixed-bloods to two assistant managers at one of the defendant-bank's branch offices and to thirty-two other white men.[91] Sales by the mixed-bloods ranged from $300 to $700 per share.[92] The district court determined that the value of the stock was $1,500 and found that the bank and employees were liable to the mixed-bloods for damages.[93]

Considering the state of the law respecting Rule 10b-5 at this time, this should have been a rather routine securities case. The basic ethic of Rule 10b-5 is that it is a sin not only to lie but also to tell half-truths. This is embodied in paragraph (b) of the Rule, which makes it unlawful: "To make any untrue statement of a material fact [(a lie)] or to omit to state a material fact necessary in order to make the statements made, in the light

85. *See infra* Part III.C (discussing the uncertain status of misappropriation as discussed in *Carpenter v. United States*, 484 U.S. 19 (1987), and *United States v. O'Hagan*, 521 U.S. 642 (1997)).

86. *See infra* Part IV.

87. 406 U.S. 128 (1972).

88. *Id.* at 136.

89. 25 U.S.C. § 677a(f) (2012).

90. *Affiliated Ute Citizens*, 406 U.S. at 136–37.

91. *Id.* at 146–47.

92. *Id.* at 147.

93. *Id.* at 156–57.

of the circumstances under which they were made, not misleading [(a half-truth)] . . . ."[94]

Since the employees represented that their offers were at the market price, but did not disclose that there was a two-tiered market, this was a typical "half-truth" case. On the other hand, the Supreme Court treated this as a "silence" case, in which materiality substituted for reliance.

The Tenth Circuit, even though taking a constricted view of defendants' liability, recounted that, as to the purchases personally made by the bank employees, "the record shows that the individual defendants [represented] that the prevailing price or market price was the figure at which their own purchase was made."[95] According to the Tenth Circuit, this sufficed for liability on the personal purchases by the employees. However, the Tenth Circuit rejected liability for purchases by other white men on the basis that, in the other purchases, the employees performed only "ministerial" acts, such as preparing an affidavit that the mixed-bloods had offered the shares to UDC.[96]

With respect to the purchases by the other white men, the Tenth Circuit acknowledged that one employee stated "I contacted a number of people [mixed-bloods] telling them that if they were interested in selling, I was interested in offering the highest price."[97] The Tenth Circuit also stated that the employees actively encouraged a market for the UDC stock.[98]

Even under the Supreme Court's later, more restrictive definition of who is a seller under the 1933 Act, the activity of the bank and its employees could constitute them as purchasers with regard to the mixed-blood sales to other white men, because they solicited the purchases from the mixed-bloods.[99] Furthermore, since the employees, besides purchas-

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94. 17 C.F.R. § 240.10b-5(b) (2013).

95. Reyos v. United States, 431 F.2d 1337, 1347 (10th Cir. 1970), *aff'd in part, rev'd in part sub nom.* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972).

96. *Reyos*, 431 F.2d at 1346.

97. *Id.* at 1347 (internal quotation marks omitted).

98. The court stated:

> The record shows that the bank officials at the Roosevelt office of the defendant bank were active in encouraging a market for the UDC stock among non-Indians. This was probably not contemplated by the UDC-bank relationship. This gave rise to some indirect benefits to the bank by way of increased deposits, but it did not constitute a violation of any duty the bank may have had to the plaintiffs by contract or otherwise.
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> . . . .
>
> . . . The bank and the individual defendant employees had developed a market at the Roosevelt Agency of the bank for UDC stock, received inquiries from time to time for stock, and had customers of the bank who were prepared to make purchases from time to time. The defendant bank and the individual defendants were thus entirely familiar with the prevailing market for the shares at all material times.

Id. at 1345, 1347.

99. *Cf.* Pinter v. Dahl, 486 U.S. 622, 654–55 (1988) (rejecting the "substantial factor" test in determining who is a seller under the 1933 Act, however, determining that someone who actually

ing for their own account, were soliciting the mixed-bloods to sell and were soliciting or receiving orders from other white men to buy, the situation could certainly fall within clause (c) of Rule 10b-5: "[engaging] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[100] Thus the defendants could be liable for fraud in their selling activity, both with respect to their own sales and those that they facilitated.

Consequently, the Court found a course of business embodying a scheme to defraud on the following basis: "This is so because the defendants devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell."[101] So far so good. But the Court then went on to categorize the defendants as "market makers," an unnecessary characterization: "The individual defendants, in a distinct sense, were market makers, not only for their personal purchases constituting 8 1/3% of the sales, but for the other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers."[102]

Not only did the Court refer to the defendants as market makers, but it also cited *Chasins v. Smith, Barney & Co.*,[103] a case involving professional market makers, which had imposed a duty of disclosure upon market makers, thus touching off a firestorm of concern.[104] While the bank and its employees were "making a market," they were not professional market makers.[105] Securities professionals who may make a mar-

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solicited a sale could be a seller even though such person did not take title (internal quotation marks omitted)).

100. 17 C.F.R. § 240.10b-5(c) (2013).

101. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153 (1972).

102. *Id.* The Court also stated:

> It is no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation or recommendation. The defendants may not stand mute while they facilitate the mixed-bloods' sales to those seeking to profit in the non-Indian market the defendants had developed and encouraged and with which they were fully familiar. The sellers had the right to know that the defendants were in a position to gain financially from their sales and that their shares were selling for a higher price in that market.

Id.

103. 438 F.2d 1167 (2d Cir. 1970).

104. *See* Note, Affiliated Ute Citizens v. United States—*The Supreme Court Speaks on Rule 10b-5*, 1973 UTAH L. REV. 119, 126–130 (1973) (explaining that while the Second Circuit in *Chasins* noted that identification as a market maker was material, it never found a duty to disclose such status—the Court's holding that market maker status must be disclosed should be limited to the facts of this case); *see also* Arthur Fleischer, Jr. et al., *An Initial Inquiry into the Responsibility to Disclose Market Information*, 121 U. PA. L. REV. 798, 846, 856–57 (1973) (discussing the problems created by *Affiliated Ute Citizens* for market traders engaged in continuous trading activity due to unresolved questions relating to the scope of this decision).

105. *Market maker* is defined by the SEC as an organization, association, or group of persons that "(1) [b]rings together the orders for securities of multiple buyers and sellers; and (2) [u]ses

ket in several stocks and engage in hundreds of transactions a day were concerned with what disclosure obligations could be imposed upon them as a result of the *Affiliated Ute Citizens* decision.

This first trilogy clearly represented an expansive, possibly overly expansive, approach to the scope of Rule 10b-5. The cases in the trilogy could easily be characterized as "liberal." The analysis by the Court at this point was not particularly rigorous and the Court appeared primarily motivated to curb wrongdoing. Policy—protecting investors—was more important than rigorous analysis.

II. THE SECOND, "CONSERVATIVE" TRILOGY: REACTION TO THE "OVER" EXPANSION OF RULE 10B-5

The 1960s were a time of social and political upheaval, sparked in large part by the civil rights movement and the Vietnam War,[106] and to some extent by reaction to the liberal decisions of the Warren Court.[107] In 1968, one issue upon which President Nixon campaigned was that he would appoint a strict constructionist to be Chief Justice of the Supreme Court.[108] After his election, he made good on his promise, appointing Warren Burger as Chief Justice in 1969.[109] He also had three other ap-

established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade." 17 C.F.R. § 240.3b-16(a) (2013).

106. *See, e.g.*, STEPHEN FEINSTEIN, THE 1960S FROM THE VIETNAM WAR TO FLOWER POWER 60–61 (2006) (noting the significant events of the 1960s); ROBERT BUZZANCO, VIETNAM AND THE TRANSFORMATION OF AMERICAN LIFE 1–9 (1999) (explaining the social and political movements of the 1960s). The Vietnam War, along with the assassinations of President John F. Kennedy, Martin Luther King, Jr., and Robert Kennedy; the riots after the King assassination; the Peace Movement of the 1960s; the Women's Liberation movement of the 1960s; and the 1968 Chicago Democratic Convention all had significant impact on politics of the 1960s. *Id.*

107. While *Brown v. Board of Education*, 347 U.S. 483 (1954), was a 1954 case, its progeny carried over to the 1960s and later. Howard A. Glickstein, Remarks, *The Impact of* Brown v. Board of Education *and Its Progeny*, 23 HOW. L.J. 51, 51 (1980). In addition, there were many other liberal decisions. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (holding that statements obtained from defendants without full warning of constitutional rights were inadmissible as a violation of the Fifth Amendment); Reynolds v. Sims, 377 U.S. 533, 586–87 (1964) (holding existing and proposed plans for apportionment of seats in the Alabama Legislature invalid under the Equal Protection Clause); Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (holding that defendants in a state court criminal prosecution have the right to have counsel appointed); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding evidence obtained by an unconstitutional search was inadmissible at trial, thereby nullifying the conviction).

108. DONALD GRIER STEPHENSON JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS 181 (1999) (noting Nixon's promise to nominate Supreme Court Justices who "would be strict constructionists who saw their duty as interpreting law and not making law" and who "would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social forces and political viewpoints on the American people" (quoting ALPHEUS THOMAS MASON & DONALD GRIER STEPHENSON, JR., AMERICAN CONSTITUTIONAL LAW 513 (11th ed. 1996)) (internal quotation marks omitted)).

109. *Warren E. Burger, 1969-1986*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/chief-justices/warren-burger-1969-1986/ (last visited Apr. 21, 2014).

pointments: Justice Blackmun in 1970,[110] and Justices Powell and Rehnquist in 1972.[111] Three of the four turned out to be moderate to strong conservatives, but Justice Blackmun, to the chagrin of the conservatives, turned out to be a strong liberal, authoring the Court's opinion in *Roe v. Wade*,[112] which has had political repercussions up to the present.

Speaking of his appointments, President Nixon stated:

> I consider my four appointments to the Supreme Court to have been among the most constructive and far-reaching actions of my presidency. . . . It is true that the men I appointed shared my conservative judicial philosophy and significantly affected the balance of power that had developed on the Warren Court. But as individuals they were each dedicated and able constitutional lawyers who often disagreed on major cases.[113]

The conservative shift that Nixon accomplished is reflected in the next trilogy of cases. While the cases reflected movement away from the prior expansionist approach of the federal courts to Rule 10b-5, they also reflected, as President Nixon suggested, able constitutional lawyering.

A. Blue Chip Stamps*: Adoption of the* Birnbaum *Standing Rule*

The first case in this trilogy, *Blue Chip Stamps v. Manor Drug Stores*,[114] involved a very unique set of facts. Normally, the concern in a public offering is that the issuer, in preparing the registration statement or other offering documents, will be unduly "optimistic" in order that the investing public may be induced by misleading statements to buy and thus to be euchred into a bad investment. The converse occurred in *Blue Chip Stamps*.

Pursuant to a federal antitrust consent decree, "Old" Blue Chip and its controlling shareholders were required to offer stock in the "New" Blue Chip to retailers who had used the stamp service but were not shareholders, in proportion to their past stamp usage.[115] The offering to the retailers would reduce the holdings of the nine retailers who previ-

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110. *Harry A. Blackmun, 1970-1994*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/associate-justices/harry-blackmun-1970-1994/ (last visited Apr. 21, 2014).

111. *Lewis F. Powell, Jr., 1972-1987*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/associate-justices/lewis-powell-jr-1972-1987/ (last visited Apr. 21, 2014); *William H. Rehnquist, 1986-2005*, SUP. CT. HIST. SOC'Y, http://www.supremecourthistory.org/history-of-the-court/chief-justices/william-rehnquist-1986-2005/ (last visited Apr. 21, 2014).

112. 410 U.S. 113 (1973).

113. Jonathan Movroydis, *Nixon Era Legal Experts Revisit High Court Nominations*, NEW NIXON (Nov. 21, 2011), http://blog.nixonfoundation.org/2011/11/nixon-era-officials-re-visit-the-rehnquist-and-powell-nominations/.

114. 421 U.S. 723 (1975).

115. *Id.* at 725–26.

ously owned 90% of "Old" Blue Chip.[116] Thus, it was to the advantage of those who controlled "Old" Blue Chip that the retailers—to whom shares in "New" Blue Chip were offered—not purchase such shares. Consequently, according to plaintiff-retailers, defendants prepared a prospectus that was fraudulently "pessimistic" in order to induce them not to buy.[117]

The so-called *Birnbaum* rule required that a plaintiff, in order to have standing to bring an action under Rule 10b-5 (which required that the fraud be "in connection with" a securities transaction), must have been a purchaser or seller of securities.[118] This rule was generally followed in the lower courts, although certain exceptions were recognized.[119] Because plaintiffs had neither bought nor sold securities, the district court in *Blue Chip* dismissed the complaint,[120] but a divided panel of the Ninth Circuit reversed the district court on the basis that the instant facts fell within an exception to the *Birnbaum* rule.[121]

In the instant case, the Supreme Court declined to recognize an exception to the *Birnbaum* rule and made the rule an absolute standing requirement, subject to no exceptions. The majority opinion concluded:

> Were we to agree with the Court of Appeals in this case, we would leave the Birnbaum rule open to endless case-by-case erosion depending on whether a particular group of plaintiffs was thought by the court in which the issue was being litigated to be sufficiently more discrete than the world of potential purchasers at large to justify an exception. We do not believe that such a shifting and highly fact-orientated disposition of the issue of who may bring a damages claim for violation of Rule 10b-5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions.[122]

There is no question that permitting persons who are not purchasers or sellers to sue carries with it possibilities of abuse. Consider the *Texas*

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116. *Id.*

117. *Id.* at 726–27.

118. Birnbaum v. Newport Steel Corp., 193 F.2d 461, 464 (2d Cir. 1952). *Birnbaum* was short and to the point; in contrast to the *Blue Chip* decision, which was almost fifty page long, *Birnbaum* was only four pages.

119. *See, e.g.*, Landy v. Fed. Deposit Ins. Corp., 486 F.2d 139, 156 (3d Cir. 1973) (holding that a plaintiff seeking injunctive relief has standing after establishing a causal connection between the alleged violations and alleged injury, even without showing a purchase of sale of the security); Mut. Shares Corp. v. Genesco, Inc., 384 F.2d 540, 547 (2d Cir. 1967) (providing an exception to the *Birnbaum* rule where the plaintiffs are seeking injunctive relief, whereby no sale or purchase of the security is necessary where the plaintiff is seeking an injunction to prevent the wrongdoing); Vine v. Beneficial Fin. Co., 374 F.2d 627, 637 (2d Cir. 1967) (granting standing because shareholder was forced to sell his shares at a later time); *see also* 5B ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS § 9:5 (2013) (explaining the several exceptions to the *Birnbaum* rule).

120. Manor Drug Stores v. Blue Chip Stamps, 339 F. Supp. 35, 40 (C.D. Cal. 1971), *rev'd*, 492 F.2d 136 (9th Cir. 1973), *rev'd*, 421 U.S. 723 (1975).

121. Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136, 141–42 (9th Cir. 1973), *rev'd*, 421 U.S. 723 (1975).

122. *Blue Chip Stamps*, 421 U.S. at 755.

Gulf Sulfur case previously discussed.[123] The corporation published a misleading press release; subsequent to the SEC action, private plaintiffs who had sold their shares after that press release initiated suits and prevailed.[124] Professor Ruder, later chairman of the SEC, opined that these lawsuits worked to the disadvantage of the continuing shareholders who did not sell on the basis of the press release.[125]

Consider a pejorative spin on the foregoing. Assume the shareholders, prior to the press release, were composed of two groups: short-term speculators and long-term investors. Upon the issuance of the press release, the speculators would sell and the investors would hold. The recovery of the speculators could devastate the capital of the corporation, since corporations frequently trade at significant multiples of book value, and thus the burden would fall upon those long-term investors who did not sell.[126]

But what if those who neither purchased nor sold could sue? Then everybody in the world could potentially claim that they would have bought "but for" the misleading press release. Such a situation would wipe out the corporation.

At trial, probably only a few potential investors would succeed. Discovery and cross-examination could demonstrate—as in the case of *Texas Gulf Sulfur*[127]—that the investor had never invested in mining stocks, or that he had sought no research on the corporation, or that he did not have the requisite liquidity to buy. But the litigation process itself can be costly, time consuming, and disruptive to the corporation and its management. Moreover, there is always the risk of success by the plaintiff. Accordingly, an unfounded lawsuit still may have settlement or strike-suit value. As the concurring opinion pointed out:

> Proving, after the fact, what 'one would have done' encompasses a number of conjectural as well as subjective issues: would the offeree have bought at all; how many shares would he have bought; how long would he have held the shares; were there other 'buys' on the market at the time that may have been more attractive even had the

123. *See supra* notes 36–45 and accompanying text.

124. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 840–42 (2d Cir. 1968).

125. David S. Ruder, Texas Gulf Sulphur—*The Second Round: Privity and State of Mind in Rule 10b-5 Purchase and Sale Cases*, 63 NW. U. L. REV. 423, 426 (1968).

126. Assume a corporation trades at four times book value. If the book value is 100, then the pre-press release market value would be 400. If the market value were to lose 10% (to 360) upon the issuance of the press release but then increase 50% (to 540) after a corrective press release, the measure of damages would be $180 per share. If 20% of the shares traded between the two press releases, the corporation would lose 36% of its capital base. This could have a devastating impact upon the corporation and its patient investors. Judge Friendly, concurring in *Texas Gulf Sulphur*, warned that this type of litigation could "lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers." 401 F.2d at 867 (Friendly, J., concurring).

127. *Id.* at 851 (majority opinion).

> offeree known the facts; did he in fact use his available funds (if any) more advantageously by purchasing something else?[128]

Judge Hufstedler, dissenting in the Ninth Circuit below, put the issue into a concise perspective: "although [strike suits] are difficult to prove at trial, they are even more difficult to dispose of before trial."[129] By framing *Birnbaum* as an absolute standing requirement, the majority insured that meritless litigation brought by a person who neither purchased nor sold could be disposed very simply and inexpensively, merely by filing a motion to dismiss for lack of standing.

In *Blue Chip Stamps*, the statutory analysis was sound: the statute and Rule 10b-5 both spoke of "purchase or sale"; Rule 10b-5 was derived from § 17 of the 1933 Act, which covered offerees—a phrase deleted from the Rule;[130] and the SEC had unsuccessfully sought to have Congress expand § 10(b) to cover "any attempt to purchase or sell, any security."[131] Accordingly, the judicial craftsmanship was well done. Moreover, the policy concern was legitimate: "If § 10b were extended to embrace offers to sell, the number of persons claiming to have been offerees could be legion."[132]

The only criticism that could be levied against *Blue Chip Stamps* is that the Supreme Court chose to bar a potentially meritorious case on the basis that there might be subsequent meretricious ones, thus raising the question whether this was the proper vehicle to adopt the current policy. Because the defendants were required to offer shares only to a particular group of plaintiffs, the potential liability was not to the world at large, but only to a discrete group.

B. Ernst & Ernst*: Scienter Mandated by Statute—A Lesson in Administrative Law*

The conservative trend continued with *Ernst & Ernst v. Hochfelder*,[133] where the Supreme Court rejected negligence as a basis for a Rule 10b-5 action and required a state of mind for the defendant that embraced "scienter." In a footnote, the Court defined scienter as a "mental state embracing intent to deceive, manipulate, or defraud."[134] However, the

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128. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 758 n.2 (1975) (Powell, J., concurring).

129. Manor Drug Stores v. Blue Chip Stamps, 492 F.2d 136, 147 n.9 (9th Cir. 1973) (Hufstedler, J., dissenting), *rev'd*, 421 U.S. 723 (1975).

130. *Compare* 15 U.S.C. § 77q(a) (2012) ("It shall be unlawful for any person in the *offer or sale* of any securities . . . or any security-based swap agreement . . . .") (emphasis added), *with* 15 U.S.C. § 78j(b) (2012) ("[It is unlawful to] use or employ, in connection with the purchase or sale of any security . . . .").

131. 103 CONG. REC. 11636 (1957) (internal quotation mark omitted).

132. *Blue Chip Stamps*, 421 U.S. at 758–59 (Powell, J., concurring).

133. 425 U.S. 185 (1976).

134. *Id.* at 193 n.12.

Court left the door open for private suits to be based upon a standard less than subjective intent to defraud by adding:

> In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10b and Rule 10b-5.[135]

While President Nixon had succeeded in changing the liberal inclination of the Supreme Court, the circuit courts retained their "liberal" perspective into the 1980s, when President Reagan in effect imposed a litmus test upon all judicial nominees.[136] Consequently, in short order, all circuits adopted recklessness as the standard under Rule 10b-5.[137]

Interestingly, the opinion dealt with a lawsuit against an aider and abettor.[138] Leston Nay was the president and controlling shareholder of First Securities;[139] however, on the side, he ran a Ponzi scheme analogous to that of Bernie Madoff,[140] in which he induced investors to invest in escrow accounts that he personally managed and which he represented would yield a high rate of return. To avoid detection, he had a policy that no one could open his mail while he was gone from the office (the "mail

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135. *Id.*

136. I can speak from personal experience. When I was interviewed by the Justice Department in connection with a judicial appointment, concern was raised about an article I had written, Charles W. Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133 (1972). While the title just as easily could have been "A Cost/Benefit Approach to the Care and Education of the Retarded," it was difficult for those interviewing me to get past any expanded notion of civil rights. *See also* Stuart Taylor Jr., *The One-Pronged Test for Federal Judges*, N.Y. TIMES, Apr. 22, 1984, at 45 (stating that Reagan put ideology first in filling judicial vacancies).

137. Phillips v. LCI Int'l, Inc., 190 F.3d 609, 620 (4th Cir. 1999); SEC v. Steadman, 967 F.2d 636, 641 (D.C. Cir. 1992); Harris v. Union Elec. Co., 787 F.2d 355, 369 n.12 (8th Cir. 1986); White v. Sanders, 689 F.2d 1366, 1367 n.4 (11th Cir. 1982) (per curiam); McLean v. Alexander, 599 F.2d 1190, 1197–98 (3d Cir. 1979); Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1023 (6th Cir. 1979); Edward J. Mawod & Co. v. SEC, 591 F.2d 588, 596 (10th Cir. 1979); Nelson v. Serwold, 576 F.2d 1332, 1337 (9th Cir. 1978) (per curiam); Cook v. Avien, Inc., 573 F.2d 685, 692 (1st Cir. 1978); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44 (2d Cir. 1978); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1044 (7th Cir. 1977); Dupuy v. Dupuy, 551 F.2d 1005, 1020 (5th Cir. 1977).

138. The Court reviewed judgment on whether civil liability exists for aiding and abetting. *Ernst*, 425 U.S. at 191 n.7, 191–93. Eighteen years later, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Court struck down aiding and abetting liability under Rule 10b-5, without recognizing how *Ernst & Ernst* undercut its analysis. 511 U.S. 164, 177 (1994). *See infra* Part IV.A.

139. *Ernst*, 425 U.S. at 189.

140. Bernard Madoff was seen by most on Wall Street as a top trader who consistently achieved high returns for his clients while charging very low fees, who was able to maintain his success in both bull and bear markets. In December 2008, he was arrested for what he described as "a giant Ponzi scheme." Diana B. Henriques & Zachery Kouwe, *U.S. Arrests a Top Trader in Vast Fraud*, N.Y. TIMES, Dec. 12, 2008, at A1 (internal quotation mark omitted). Mr. Madoff had for years been paying returns to certain investors using money he received from other investors. When a few clients sought to make a large withdrawal from their accounts, the scheme collapsed. Losses were estimated to be as high as $50 billion. *Id.*; *see also* Diana B. Henriques, *U.S. Proposes 150 Years for Madoff*, N.Y. TIMES, June 27, 2009, at B3.

rule").[141] After he committed suicide, First Securities became bankrupt, and Ernst & Ernst was charged by plaintiff for aiding and abetting Nay's fraud by not uncovering the mail rule.[142] Ernst & Ernst was not charged with intentional misconduct but rather "inexcusable negligence."[143]

Once again, the opinion exemplified sound judicial reasoning. The Court first turned to the language of the statute. Section 10 of the 1934 Act makes it illegal "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance" in contravention of SEC rules.[144] In analyzing this language, the Court concluded that "[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct."[145] The Court then looked at the legislative history of the 1934 Act and found little bearing upon the interpretation of § 10.[146] However, what little history existed clearly was not inconsistent with the approach taken by the Court.[147]

Much of the opinion addressed and rebutted arguments by the SEC that Rule 10b-5 encompassed negligent conduct. The Court extensively addressed the SEC's argument that the structure of the securities acts supported § 10 sounding in negligence. The SEC pointed out that § 9(e) requires "willful[] participat[ion]"[148] while § 10(b) is "not by its terms explicitly restricted to will[ing], knowing, or purposeful conduct."[149] In response, the Court embarked upon its own analysis of the structure of the securities acts.

Looking first to the 1933 Act, the Court noted that the express liability provisions all sounded in negligence,[150] but also contained procedural protections, such as requiring plaintiff to post a bond[151] or imposing

141. *Ernst*, 425 U.S. at 190 (internal quotation mark omitted).
142. *Id.* at 189–90.
143. *Id.* at 190 n.5 (internal quotation marks omitted).
144. 15 U.S.C. § 78j(b) (2012).
145. *Ernst*, 425 U.S. at 197.
146. *Id.* at 201–07.
147. In the concluding portion of its opinion, the Court stated: "When a statute speaks so specifically in terms of manipulation and deception, and of implementing devices and contrivances—the commonly understood terminology of intentional wrongdoing—and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute to negligent conduct." *Id.* at 214.
148. 15 U.S.C. § 78i(f) (2012).
149. *Ernst*, 425 U.S. at 207.
150. Section 11(b), 15 U.S.C. § 77k(b) (2012), imposes almost absolute liability on the issuer, but directors, underwriters, experts and officers who sign the registration statement are not liable if they can establish a due diligence defense. *Ernst*, 425 U.S. at 208 n.26. A similar defense exists under § 12(a)(2), 15 U.S.C. § 77l(a)(2) (2012), and controlling person liability under § 15, 15 U.S.C. § 77o (2012), may be avoided if the control person had no "reasonable ground(s) to believe" in the facts rendering the control person liable. *Ernst*, 425 U.S. at 208 (alteration in original) (internal quotation marks omitted). Basically, a person who can establish that he or she was not negligent will not be liable.
151. *Id.* at 208–10.

a shortened statute of limitation.[152] Because Rule 10b-5 protects buyers as well as sellers, plaintiff-buyers could choose to bring suit under Rule 10b-5, instead of the aforesaid express liability provisions, and thereby short circuit these statutory protections for defendants in the case of negligent wrongdoing. The Court stated:

> We think these procedural limitations indicate that the judicially created private damages remedy under §10(b) which has no comparable restrictions–cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing. Such extension would allow causes of action covered by §§ 11, 12(2), and 15 to be brought instead under § 10(b) and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions.[153]

The Court addressed the 1934 Act provisions in a footnote.[154] Other than § 16(b), which was directed at officers, directors, and ten percent shareholders, and which essentially created absolute liability for "insider" trading encompassed within a six-month period,[155] the Court opined that all other express liability provisions had state of mind conditions. Section 9(e), as stated above, requires willful participation; § 18, dealing with filing misleading statements with the SEC, requires knowledge; and § 20, dealing with controlling person liability, requires that the controlling person "induce" the controlled person's act.[156] These latter two provisions are actually phrased as affirmative defenses.

In effect, the Supreme Court recognized that, if Rule 10b-5 sounded in negligence, Rule 10b-5, like Sherwin Williams's paint, could "cover the earth"[157] and make the express liability provisions superfluous.

The SEC also argued that the language of subsections (b) and (c) of Rule 10b-5, standing alone, support a negligence standard.[158] This argument, in part, was also the rationale for the dissent.[159] The majority easily disposed of an argument based upon the language of Rule 10b-5, rather than on the statute, by recounting well-settled administrative law principles. The authority of the SEC to promulgate rules is limited by the rule

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152. 15 U.S.C. § 77m (2012).

153. *Ernst*, 425 U.S. at 210 (footnote omitted).

154. *Id.* at 209 n.28.

155. *Id.*; 15 U.S.C. § 78p(b) (2012). The Court apparently saw Congress holding "insiders" to a higher standard than that applicable to persons generally.

156. 15 U.S.C. §§ 78(i)(f), 78(r)(a), 78(t)(a) (2012).

157. SHERWIN-WILLIAMS, http://www.sherwin-williams.com/ (last visited Apr. 22, 2014) (depicting the company logo containing the slogan "cover the earth").

158. *Ernst*, 425 U.S. at 212. In *Aaron v. SEC*, 446 U.S. 680, 690 (1980), the Court held that similar language in a statute, § 17 of the 1933 Act, 15 U.S.C. § 77q (2012), sounded in negligence, but the same language in Rule 10b-5 could not because the interpretation of the rule was controlled by the statute, § 10(b).

159. *Ernst*, 425 U.S. at 216–17 (Blackmun, J., dissenting).

making authority conferred by the statute.[160] The rule must implement the statute, not override it. Thus, if the statute gives the SEC power to proscribe fraud, the SEC does not have the power to proscribe negligence. The rule cannot be broader than the authority conferred by the statute. This probably accounts for the half-hearted dissent.

C. Santa Fe: *Harmonizing State and Federal Law and Putting Closure on a Federal Law of Corporations*

Santa Fe Industries, Inc. v. Green[161] is the last case in the trilogy of thoughtful and well-crafted conservative decisions limiting the scope of Rule 10b-5. As will be discussed, the policy perspective envisioned in the opinion actually played out in the controversy that gave rise not just to the *Santa Fe* opinion but to two other cases as well.[162]

Santa Fe involved the short form merger of a subsidiary of Santa Fe, Kirby Lumber Corp.,[163] with another subsidiary of Santa Fe. No vote of the shareholders of Kirby was necessary, but the shareholders were entitled to ten days' notice of the effectiveness of the merger and had the right to dissent and receive the judicially appraised value of their shares.[164] Santa Fe furnished Kirby minority shareholders with an information statement containing an appraisal of the Kirby assets. While the physical assets were appraised at $640 per share, Morgan Stanley valued the shares at $125 per share and Santa Fe offered the minority shareholders $150 per share.[165]

Rather than following through on their appraisal rights,[166] plaintiffs in the *Santa Fe* case filed suit under Rule 10b-5, alleging a scheme to defraud the minority shareholders out of the difference between the value of the physical assets and the $150 per share offered by Santa Fe. Both the district court[167] and the Second Circuit[168] viewed plaintiffs' complaint as presenting two grounds for liability: (1) gross undervaluation, and (2)

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160. *See* Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute, is a mere nullity."); *see also* Miller v. United States, 294 U.S. 435, 439 (1935) (noting an administrative agency cannot create a rule that regulates anything beyond the what Congress enabled it to regulate through the plain meaning of the statute).

161. 430 U.S. 462 (1977).

162. *See infra* text accompanying notes 182–84.

163. Kirby was actually a subsidiary of a subsidiary and another subsidiary was formed which merged into Kirby, such that Kirby was the surviving corporation. The net effect of the corporate machinations was that the majority shareholders of Kirby were cashed out, and Santa Fe now had a wholly owned subsidiary. *Santa Fe*, 430 U.S. at 465.

164. *Id.* at 465–66.

165. *Id.* at 466.

166. Initially, plaintiffs petitioned for appraisal, but then withdrew the petition and filed the federal lawsuit. Green v. Santa Fe Indus., Inc., 391 F. Supp. 849, 855 (S.D.N.Y. 1975), *aff'd in part, rev'd in part*, 533 F.2d 1283 (2d Cir. 1976), *rev'd*, 430 U.S. 462 (1977).

167. *Id.* at 852.

168. Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1285 (2d Cir. 1976), *rev'd*, 430 U.S. 462 (1977).

squeezing out the minority without a business purpose. Both courts agreed that gross undervaluation without any accompanying misrepresentation or lack of disclosure would not be actionable under Rule 10b-5.[169] Although the district court held that Delaware law did not require a business purpose for a squeeze-out merger,[170] the Second Circuit held that neither misrepresentation nor nondisclosure was necessary for a Rule 10b-5 action:

> We hold that a complaint alleges a claim under Rule 10b-5 when it charges, in connection with a Delaware short-form merger, that the majority has committed a breach of its fiduciary duty to deal fairly with minority shareholders by effecting the merger without any justifiable business purpose. The minority shareholders are given no prior notice of the merger, thus having no opportunity to apply for injunctive relief, and the proposed price to be paid is substantially lower than the appraised value reflected in the Information Statement.[171]

The Supreme Court, in reversing the Second Circuit, took essentially the same tack it took in *Ernst & Ernst*. It first looked to the language of the statute, focusing upon the words "manipulative or deceptive" in conjunction with "device or contrivance,"[172] and then reasserted that a rule cannot exceed the power conferred by Congress pursuant to the statute.[173] Consequently, the Court concluded that "the claim of fraud and fiduciary breach in this complaint states a cause of action under any part of Rule 10b-5 only if the conduct alleged can be fairly viewed as 'manipulative or deceptive.'"[174] Since the district court found that there was no omission or misstatement of a material fact, plaintiffs had no cause of action.[175]

The opinion could have concluded at this point but the Court also undertook a *Cort v. Ash*[176] analysis to drive home the point that breaches of fiduciary duty, unaccompanied by deception, are not within a private cause of action under Rule 10b-5. The Court asserted that the "fundamental purpose" of the securities laws was to implement a policy of "full and fair disclosure."[177] If there is full disclosure, then "the fairness of the

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169. 533 F.2d at 1291; 391 F. Supp. at 854.

170. *Compare* Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983) (explaining that corporations need not have a valid business purpose when effectuating a merger), *with* Coggins v. New Eng. Patriots Football Club, Inc., 492 N.E.2d 1112, 1119 (Mass. 1986) (holding that under Massachusetts law, defendants must prove (1) the merger was for a legitimate business purpose, and (2) it was fair to the minority), *and* Bryan v. Brock & Blevins Co., 490 F.2d 563, 570 (5th Cir. 1974) (stating that the Georgia Corporation Merger Statute requires corporations to show a valid business purpose for a merger in order to avoid the statute's anti-fraud provisions).

171. *Green*, 533 F.2d at 1291.

172. *Santa Fe*, 430 U.S. at 472 (internal quotation marks omitted).

173. *Id.* at 472–73.

174. *Id.* at 473–74.

175. *Id.* at 474.

176. *See* 422 U.S. 66, 78 (1975).

177. *Santa Fe*, 430 U.S. at 477–78.

terms of the transaction is at most a tangential concern."[178] Consequently, recognizing a cause of action merely for breach of fiduciary duty is not necessary to fulfill the purposes of the securities laws. Moreover, breach of fiduciary duty is an area traditionally relegated to state law. Accordingly, the Court rejected the possibility that Rule 10b-5 could be used to create a federal law of corporations:

> Federal courts applying a "federal fiduciary principle" under Rule 10b-5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system. Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.[179]

In effect, the Court was harmonizing federal and state law. The purpose of federal law is to promote disclosure.[180] Where, as here, full disclosure is made, there is no federal cause of action. However, if the fully disclosed facts reveal a basis for breach of fiduciary duty or other state remedy, the plaintiff has access to state law for a substantive remedy.

This is exactly what occurred in the Santa Fe situation. While plaintiffs in the case before the Supreme Court failed in their federal action because Santa Fe made full disclosure, including the fact that the physical assets were worth $640 per share,[181] substantially more than the $150 per share offered by Santa Fe, plaintiffs in two other lawsuits took advantage of this disclosure to initiate appraisal and breach of fiduciary duty actions. In a case filed in Delaware under the appraisal statute, plaintiffs recovered $254.40 per share;[182] on the other hand, in New York, plaintiffs filed a breach of fiduciary duty case, but were not successful because, as required by Delaware law, there was no fraud, misrepresentation, or blatant overreaching.[183] Thus, the factual situation demonstrates the workability of *Santa Fe* limiting Rule 10b-5 actions to those involving deception because the disclosure provided by federal law would enable a plaintiff to take advantage of common law remedies.[184]

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178. *Id.* at 478.

179. *Id.* at 479 (footnote omitted).

180. *Id.* at 477–78.

181. *Id.* at 466.

182. Bell v. Kirby Lumber Corp., 413 A.2d 137, 140 (Del. 1980).

183. Green v. Santa Fe Indus., Inc., 514 N.E.2d 105, 113 (N.Y. 1987) (holding that the plaintiff's acceptance of the offer by Santa Fe was not made in reliance on any deception or omission on the part of defendants but was, on the contrary, the result of an informed judgment that resorting to an appraisal proceeding would be too costly and time-consuming).

184. Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1108 (1991), undercut this schema somewhat by not finding maldisclosure actionable when the minority shareholders did not have sufficient votes to defeat the merger proposal. As Justice Kennedy pointed out in his dissent, in this situation there is all the more need for full disclosure. *Id.* at 1118 (Kennedy, J., dissenting). He asserted that the majority had engaged in "a sort of guerilla warfare to restrict a well-established implied right of action." *Id.* at 1115.

The second trilogy, while "curbing" the expansion of Rule 10b-5 litigation, did so in a responsible manner that was consistent with both the policy and the language of the securities laws. The securities laws were designed to protect investors; *Blue Chip Stamps* precluded a "non-investor" from claiming he or she would have bought "but for" some alleged misstatement, while using the benefit of hindsight. *Ernst & Ernst* focused on the language of the statute, asserting that an administrative rule cannot be broader than its statutory authorization. It also harmonized the scope of an implied action with the express civil actions created by Congress. Finally, *Santa Fe* recognized that the focus of the securities laws is upon disclosure, and that a federal action should not lie where the issuer has made full and complete disclosure, even if it has disclosed a breach of fiduciary duty. State and federal law were harmonized since the federal disclosure could provide the information necessary to assert state remedies.

III. THE INSIDER TRADING TRILOGY

The next trilogy of cases, *Chiarella v. United States*,[185] *Dirks v. SEC*,[186] and *Carpenter v. United States*,[187] all dealt with insider trading and represent a significant departure from the sound reasoning reflected in the previous trilogy. They also represent a move toward constraining the scope of Rule 10b-5 in circumstances where its broad application would have furthered the policy of the securities laws. While the previous trilogy put a brake upon the unwarranted expansion of Rule 10b-5, it did so by focusing on the language of the statute, which limits the scope of the rule; moreover, it did so in a manner that was not aimed at permitting fraudulent activity to escape accountability.

On the other hand, as will be demonstrated, the insider trading trilogy and the final trilogy dealing with collateral participants have encouraged illicit activity and undermined the purpose of the securities laws "to ensure the fair and honest functioning of impersonal national securities markets where common-law protections have proved inadequate,"[188] or, as Congress has stated, "to assure that dealing in securities is fair and without undue preferences or advantages among investors."[189]

A. Chiarella*: The Start of Retrenchment*

Chiarella dealt with an employee of Pandick Press, a financial printer.[190] He worked on five documents dealing with corporate takeover

185. 445 U.S. 222 (1980).
186. 463 U.S. 646 (1983).
187. 484 U.S. 19 (1987). The Court, in *United States v. O'Hagan*, later accepted the misappropriation theory. 521 U.S. 642, 650 (1997); *see infra* text accompanying note 302.
188. *Chiarella*, 445 U.S. at 248 (Blackmun, J., dissenting).
189. H.R. REP. NO. 94-229, at 91 (1975) (Conf. Rep.); S. REP. NO. 94-75, at 3 (1975).
190. 445 U.S. at 224 (majority opinion).

bids and, while the names of the bidder and the target were not disclosed to the printer until the night before the bids were made public, Chiarella was able to discern their identity and make pre-bid purchases at what was then the market price.[191] After the takeover bids were made public and the stock price rose, he sold the shares and realized a substantial gain.[192] Chiarella was first investigated by the SEC, and subsequently entered into a consent decree in which he disgorged his profits.[193] He was then indicted by the U.S. Attorney and convicted on seventeen counts of violating Rule 10b-5.[194] The majority and the dissent viewed the scope of the indictment and the jury instructions from very different perspectives.

According to the Court, the jury, pursuant to the district court's charge, could convict Chiarella if it "found that he willfully failed to inform sellers of target company securities that he knew of a forthcoming takeover bid that would make their shares more valuable."[195] The Court opined that it could not affirm Chiarella's conviction "without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information,"[196] or, in other words, a broad duty to the market as a whole. This the Court refused to do. Instead, it asserted that silence[197] is actionable only where there is a duty to disclose and such a duty arises only from a common law relationship of trust and confidence between the parties to the transaction.[198]

The Court's decision is problematic in several respects. First of all, the Court applied what it describes as the "catchall" provision of the 1934 Securities Exchange Act.[199] The reason why the securities laws were enacted was because the common law was inadequate. Yet, the Court used the common law to constrict the scope of the securities laws. This is catch-22 reasoning. The Court opined that, although Rule 10b-5 is a catchall provision, "what it catches must be fraud."[200] But there is no question that Chiarella engaged in fraudulent activity. As Chief Justice Burger eloquently stated in his dissent: "Chiarella, working literally in the shadows of the warning signs in the printshop, misappropriated—stole to put it bluntly—valuable nonpublic information entrusted to him in the utmost confidence."[201]

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191. *Id.*

192. Over the course of 14 months, Chiarella made a profit of more than $30,000. *Id.* An attorney who worked on the case told me that the SEC was tipped to Chiarella's activity by a jilted boyfriend who thought his romance was undercut by his rival's new found wealth.

193. *Id.*

194. *Id.* at 225.

195. *Id.* at 226.

196. *Id.* at 233.

197. The court treated this case as a "silence" case since Chiarella made no disclosure before he traded. *Id.* at 226.

198. *Id.* at 230.

199. *Id.* at 226.

200. *Id.* at 234–35.

201. *Id.* at 245 (Burger, C.J., dissenting). Chief Justice Burger also pointed out that:

In this connection, the Court positively cited *Cady, Roberts & Co.*[202] to support its position, without appreciating that *Cady, Roberts* in fact undermined its opinion. As discussed earlier, *Cady, Roberts* dealt with a bad news situation in which an insider would sell, very likely, to someone who was not a shareholder.[203] The defendant in *Cady, Roberts* argued that there was not a common law fiduciary duty by a corporate insider to someone who was not a shareholder. On the other hand, the SEC took the position that the securities laws were not constrained by common law concepts.

Cady, Roberts involved a "traditional insider" as tipper and "company-specific" information. Tender offers present a different paradigm. The diagram set forth in Exhibit A illustrates the situation.[204] Below the bidder is what is sometimes referred to as "temporary insiders," such as attorneys and investment bankers. And the relevant information is not company-specific, but rather "market information."

The majority focused upon the fact that Chiarella had no relationship, and thus no common law duty to the shareholders of the target corporation.[205] Chief Justice Burger, with a conservative "tough on crime" perspective, focused upon the fact that Chiarella stole confidential information from his employer to obtain an illicit gain.[206] This was the essential difference between the majority and minority positions.

While the Court's majority, in applying "disclose or abstain," found an obligation to disclose only when the defendant owed a duty to the person on the other side of the transaction,[207] Justice Burger found the duty to disclose became operative because of the illicit manner in which the defendant obtained the information.[208] He found support from Professor Keeton:

> [The] way in which the buyer acquires the information which he conceals from the vendor should be a material circumstance. The information might have been acquired as the result of his bringing to

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> Chiarella, himself, testified that he obtained his informational advantage by decoding confidential material entrusted to his employer by its customers [and that Chiarella's counsel conceded that] . . .
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> . . . "Mr. Chiarella got on the stand and he conceded, he said candidly, 'I used clues I got while I was at work. I looked at these various documents and I deciphered them and I decoded them and I used that information as a basis for purchasing stock.' There is no question about that. We don't have to go through a hullabaloo about that. It is something he concedes. There is no mystery about that."

Id. at 244–45.

202. *Id.* at 241–42 (discussing Cady, Roberts & Co., Exchange Act Release No. 34-6668, 1961 WL 60638 (Nov. 8, 1961)).

203. *See supra* text accompanying notes 46–55.

204. *See infra* Exhibit A.

205. *Chiarella*, 445 U.S. at 231 (majority opinion).

206. *Id.* at 244–45 (Burger, C.J., dissenting).

207. *Id.* at 227 (majority opinion).

208. *Id.* at 240 (Burger, C.J., dissenting).

> bear a superior knowledge, intelligence, skill or technical judgment; it might have been acquired by mere chance; or it might have been acquired by means of some tortious action on his part. . . . *Any time information is acquired by an illegal act it would seem that there should be a duty to disclose that information.*[209]

Justice Burger also found support in the repeated use of "any" in the statute: section (b) made illegal actions by "*any* person engaged in *any* fraudulent scheme,"[210] and concluded that "congressional concern was [not] limited to trading by 'corporate insiders' . . . [and that] Congress cannot have intended one standard of fair dealing for 'white collar' insiders and another for the 'blue collar' level."[211]

Finally, Justice Burger looked at legislative history which indicated that the purpose of the securities laws was to prohibit "manipulative and deceptive practices which have been demonstrated to fulfill no useful function,"[212] and to "assure that dealing in securities is fair and without undue preferences or advantages among investors."[213] He then concluded that: "An investor who purchases securities on the basis of misappropriated nonpublic information possesses just such an 'undue' trading advantage; his conduct quite clearly serves no useful function except his own enrichment at the expense of others."[214]

Justice Burger's approach makes more sense than that of the majority, which is predicated upon the existence, or lack thereof, of a common law fiduciary duty. Since the securities laws were enacted because of the shortcomings of the common law in dealing with securities fraud, why then look to the common law to interpret the securities laws? On the other hand, Justice Burger was guided by the policy behind the securities laws. As the SEC stated in *Cady, Roberts*, in view of the "broad language of the anti-fraud provisions[,] we are not to be circumscribed by fine distinctions and rigid classifications."[215] Accordingly, the SEC concluded:

> Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the public to whom he sells, it is clearly not appropriate to intro-

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209. *Id.* (alteration in original) (quoting W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 25–26 (1936)).

210. *Id.*

211. *Id.* at 240–41.

212. *Id.* at 241 (quoting S. REP. NO. 73-792, at 6 (1934)) (internal quotation mark omitted).

213. *Id.* (quoting H.R. REP. NO. 94-229, at 91 (1975) (Conf. Rep.)) (internal quotation mark omitted).

214. *Id.*

215. Cady, Roberts & Co., Exchange Act Release No. 34-6668, 1961 WL 60638, at *4 (Nov. 8, 1961).

> duce these into the broader anti-fraud concepts embodied in the securities acts.[216]

Justice Burger's position is not quite a "possession" standard. But it is not burdensome to expect that corporate insiders and securities professionals should know that it is illegal for them to trade on material, nonpublic information. The doctrine of scienter would limit the persons subject to liability. This, of course, would make it easier to surmount a motion to dismiss, whereas Justice Burger sought to encourage disposing of litigation on a motion to dismiss in *Blue Chip Stamps*.

The majority may have been led astray by the inept phrase "disclose or abstain," which originated in the *Texas Gulf Sulphur* case.[217] The fallacy with phrasing the duty as disclose or abstain is that, invariably, the person subject to this adage has a duty not to disclose. For example, in *Texas Gulf Sulphur*, the employees had a duty to their employer not to disclose while the corporation assessed the scope of the discovery and obtained additional mineral rights. Thus, the employee did not have the option of disclosing or abstaining.[218]

The Second Circuit should have articulated the employees' obligation as "abstain until disclosable." If that were the jargon with which the federal courts were grappling, the Supreme Court might have upheld Chiarella's conviction since this latter standard does not implicate any duty to the shareholders of the target company. Holding a person like Chiarella accountable for stealing his employer's information in order to obtain an informational advantage is certainly consistent with the securities law policies recounted by Justice Burger.

In the long run, Justice Burger's position prevailed. His closing comment that Chiarella stole valuable nonpublic information that was entrusted to him[219] became the basis for the misappropriation theory.[220] A year later, the misappropriation theory was the basis of a conviction in *United States v. Newman*,[221] and four years later, in a case involving facts that were a clone of those in *Chiarella*, the conviction of an employee of a financial printing firm was upheld on the basis that he "misappropriated—stole to put it bluntly—valuable nonpublic information" entrusted to him by his employer.[222]

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216. *Id.* at *5.
217. *See supra* text accompanying notes 35–45.
218. The *Dirks v. SEC*, 463 U.S. 646 (1983), discussion, *infra* note 243, is one of the rare instances where "disclose or abstain" might actually work.
219. *Chiarella*, 445 U.S. at 245 (Burger, C.J., dissenting).
220. *See id.* (Blackmun, J., dissenting).
221. 664 F.2d 12, 17 (2d Cir. 1981).
222. SEC v. Materia, 745 F.2d 197, 201 (2d Cir. 1984) (internal quotation marks omitted).

B. Dirks*: A Clear Policy Choice Favoring Greed over Investors*

1. The Basic Facts

Dirks v. SEC[223] involved a very strange and convoluted set of facts, which may, in part, account for the divergence between the majority and minority opinions.[224] It is as if the members of the Supreme Court were watching two different movies: the majority seeing a hero and the dissent seeing a villain.

The underlying facts were close to unbelievable. Equity Funding was an insurance company that sought to increase its earnings.[225] Unfortunately, not enough real people were buying its policies. So, it began creating people, who then bought policies so as to increase revenue.[226] Management understood that, in the insurance business, there are both inflows and outflows, as people die and the beneficiaries collect on the policies. Consequently, Equity Funding also killed some people—fortunately, these persons were only fictitious to begin with.[227]

In early 1973, a disgruntled former executive, Ronald Secrist, tipped Raymond Dirks, an officer of a broker-dealer firm who specialized in insurance company securities, about the scam and asked him to publicize it.[228] Secrist estimated that, by 1972, Equity Funding had 40,000 fictitious policies, about one-third of its business.[229] Dirks interviewed Equity Funding employees and, although management denied the charges, some employees corroborated Secrist's story.[230]

Dirks then took two divergent courses of action. He disclosed what he had learned to a number of clients and investors, including five institutional investors that subsequently liquidated more than $16 million in

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223. 463 U.S. 646 (1983).
224. *See id.* at 648–52.
225. *See id.* at 649.
226. Dirks v. SEC, 681 F.2d 824, 829 (D.C. Cir. 1982), *rev'd*, 463 U.S. 646 (1983).
227. The SEC found:

> Since 1970, EFCA had been creating fictitious life insurance policies, known to insiders as "Y business." These policies were sold to reinsurers for an amount equal to 80% of first-year premiums. By this method, management hoped to generate cash flow, maintain an impressive growth rate and boost the value of EFCA stock. In some cases, legitimate policies were reinsured for more than their face amount, while at other times totally fictitious policies were created. To carry out this scheme, EFCA created supporting files, medical records and death certificates for non-existent policy holders, bribed and intimidated some of its auditors and state examiners, and falsified its financial records to show the receipt and disposition of non-existent premiums. Secrist claimed that he had actually witnessed the creation of fictitious files which were used to deceive EFCA's auditors. He asserted that, as a result of such activities, many EFCA employees had left the company. He estimated that, by 1972, EFCA carried at least 40,000 fictitious policies on its books, representing at least one-third of EFCA's outstanding life insurance business.

Raymond L. Dirks, Exchange Act Release No. 34-17480, 1981 WL 36329, at *2 (Jan. 22, 1981) (footnotes omitted).
228. *Id.* at *1–2.
229. *Id.* at *2.
230. *Dirks*, 463 U.S. at 649.

Equity Funding investments.[231] As the SEC opinion chronicles, Dirks had numerous conversations with these investors and even arranged contacts between them and former employees of Equity Funding. Dirks also opined that Equity Funding stock would soon stop trading and that the stock should be sold.[232] In return, Dirks received additional business; the majority and minority took differing views as to the effect of this upon Dirks's motivation.[233]

However, Dirks also contacted Equity Funding's auditors and the Wall Street Journal, which, after following up on Dirks's information, contacted the SEC and the SEC then called Dirks in.[234] The majority asserts then the Wall Street Journal declined to write the story,[235] while the dissent asserts that the Wall Street Journal investigated and informed the SEC.[236] The same day Dirks met with the SEC, March 27, 1973, the New York Stock Exchange suspended trading because of the increased trading volume and the precipitous drop in price from $26 per share to $15.[237] Also at this time, the California and Illinois Departments of Insurance were investigating Equity Funding and were preparing to shut down its operations.[238]

2. The Divergent Views of the Majority and Minority

In view of the foregoing facts, consider the differing approaches of the majority and minority. According to the majority, the SEC had "concluded" in disciplining Dirks that: "Where 'tippees'—regardless of their motivation or occupation—come into possession of material . . . 'information that they know is confidential and know or should know came from a corporate insider,' they must either publicly disclose that information or refrain from trading."[239]

While the foregoing quotation is found in the SEC's opinion, it is not the conclusion or holding of the SEC. Rather the SEC concluded:

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231. *Id.*

232. *Dirks*, 1981 WL 36329, at *5.

233. The majority focused upon the SEC finding that Dirks "played an important role in bringing [Equity Funding's] massive fraud to light," *Dirks*, 463 U.S. at 651–52 (alteration in original) (internal quotation marks omitted), while the dissent focused upon the fact that Dirks and his firm "gained both monetary rewards and enhanced reputations for 'looking after' their clients," *id.* at 669 n.4 (Blackmun, J., dissenting), by enabling them to "dump[] stock on unknowing purchasers." *Id.* at 671.

234. *Id.* at 670.

235. *Id.* at 649–50 (majority opinion).

236. *Id.* at 670 (Blackmun, J., dissenting).

237. *See id.*

238. In 1983, I was Deputy Attorney General for Illinois, and Illinois insurance officials informed me that they and the California officials were preparing a "raid" on the offices of Equity Funding at the time the story broke.

239. *Dirks*, 463 U.S. at 651 (majority opinion) (quoting Raymond L. Dirks, Exchange Act Release No. 34-17480, 1981 WL 36329, at *6 (Jan. 22, 1981)).

> In sum, Dirks [an analyst] came into possession of material, non-public corporate information, from persons who he knew were insiders, at a time when he knew that the information was confidential and not then publicly available. He communicated that information to those likely to trade before the information became generally available. In committing these acts, Dirks acted with scienter. Accordingly, we conclude that Dirks willfully aided and abetted violations by Boston, Dreyfus, TZP, M&N and Bristol of Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act and Rule 10-5b thereunder.[240]

There are two fundamental differences between the two "conclusions." The SEC did not rely on "disclose or abstain," but rather found Dirks liable as an aider and abettor because he disclosed confidential information to persons who would sell before the information would be publicly available. In this regard, the SEC opinion was a forerunner of Rule 10b5-2(b)(2).[241]

Second, the SEC clearly focused upon scienter. This is a key element in insider trading—one that provides the proper bounds to limit the scope of persons who are subject to the insider trading proscriptions. Dirks was a securities professional who knew the information was material,[242] knew the information was non-public, knew that it was given to him in confidence to publicly disclose, and knew that his tippees would sell before public disclosure.[243]

The Court began its analysis of the issues raised by the SEC sanctioning of Dirks by again referencing *Cady, Roberts* as a seminal case, once again without realizing that the *Cady, Roberts* decision sanctioned a securities professional who was tipped by an insider who did not "sin";

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240. *Dirks*, 1981 WL 36329, at *9.

241. *See* 17 C.F.R. § 240.10b5-2(b)(2) (2013) (promulgated in Selective Disclosure and Insider Trading, Exchange Act Release No. 33-7881, Securities Exchange Act Release No. 34-43154, Investment Company Act Release No. 24599, 73 SEC Docket 3 (proposed Aug. 15, 2000)).

242. As the SEC stated:

> The inside information to which Dirks had become privy demonstrated, in the words of one commentary, that "one of the darlings of Wall Street, a company that had managed to produce continued high earnings growth for a decade, was, instead, a gigantic fraud." Under the circumstances, it took little insight into the operations of the market—and Dirks was, of course, a highly experienced and highly sophisticated analyst—to recognize that anyone who held EFCA shares and became aware of the information in Dirks' possession would have a strong incentive to sell before that knowledge became widespread. Indeed, Dirks expressly advised at least one of those whom he tipped to sell, and he observed that others did so, even without an explicit recommendation, based on his revelations. Accordingly, we find that Dirks knew or should have known that his selective disclosure of the information he had gleaned from EFCA insiders would result in trading.

Dirks, 1981 WL 36329, at *9 (footnotes omitted).

243. Parenthetically, this is one of the rare times that "disclose or abstain" made sense: Dirks did have the option (if not the obligation) to disclose publicly the confidential information he had received. Absent such a disclosure, he had the obligation to abstain.

in other words, *Cady, Roberts* was in direct opposition to the approach ultimately taken by the Court in *Dirks*.[244]

The Court, in Part II of the *Dirks* opinion, accepted the concept set forth in *Cady, Roberts* that, for there to be a violation of Rule 10b-5 in an insider trading context, two elements must be met: "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure."[245]

But, relying on *Chiarella*, the Court asserted that "'a duty to disclose under § 10(b) does not arise from the mere possession of nonpublic market information.' Such a duty arises rather from the existence of a fiduciary relationship."[246]

Again, *Cady, Roberts* rejected the argument that a duty under the securities laws derived from common law fiduciary concepts.[247]

The Court concluded Part II of its opinion by affirming the *Cady, Roberts* principle that "an insider will be liable under Rule 10b-5 for inside trading only where he fails to disclose material nonpublic information before trading on it and thus makes 'secret profits.'"[248]

At this point it is not clear where the Court is going. But the Court then runs amuck in Part III, beginning its analysis by recognizing that a "typical tippee" generally has no common law fiduciary relationship with the corporation.[249] The SEC had taken the position that a tippee who receives confidential non-public material information from an insider is subject to the same constraints as the insider.[250] Following *Chiarella*, the Court *rejected* the proposition that "*[anyone]*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose."[251] However, it did acknowledge: "[t]he conclusion that recipients of inside information do not invariably acquire a duty to dis-

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244. Cady, Roberts & Co., Exchange Act Release No. 34-6668, 1961 WL 60638, at *2 (Nov. 8, 1961).

245. Dirks v. SEC, 463 U.S. 646, 653–54 (1983) (quoting Chiarella v. United States, 445 U.S. 222, 227 (1980)) (internal quotation marks omitted).

246. *Id.* at 654 (citation omitted).

247. As the SEC stated:

> Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the public to whom he sells, it is clearly not appropriate to introduce these into the broader anti-fraud concepts embodied in the securities acts.

Cady, Roberts, 1961 WL 60638, at *5.

248. *Dirks*, 463 U.S. at 654 (quoting *Cady, Roberts*, 1961 WL 60638, at *6 n.31).

249. *Id.* at 655.

250. *Id.* at 655–56.

251. *Id.* at 656 (alteration in original) (quoting United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980)) (internal quotation marks omitted).

close or abstain does not mean that such tippees always are free to trade on the information. The need for a ban on some tippee trading is clear."[252]

What is the "some tippee trading" that is forbidden? According to the Court:

> Thus, some tippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them *improperly*. And for Rule 10b-5 purposes, the insider's disclosure is improper only where it would violate his *Cady, Roberts* duty. Thus, a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.[253]

Besides inferring that insider trading liability is the exception rather than the rule by repeated use of "some," the Court then waffled on when an insider breaches his fiduciary duty of non-disclosure: "All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders."[254] Consequently, "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach."[255] Consequently, the tippee sins only if the tipper sins, and the tipper sins only when he or she receives a benefit from the tippee.

As indicated above, the dissent had an entirely different view of both the law and the facts. With respect to the facts, the dissent observed, "In disclosing . . . [inside] information to Dirks, Secrist intended that Dirks would disseminate the information to his clients, those clients would unload their Equity Funding securities on the market, and the price would fall precipitously, thereby triggering a reaction from the authorities."[256]

The dissent also focused upon the fact that Dirks was compensated for "looking after" his clients[257] and that his efforts to bring the fraud to

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252. *Id.* at 659.

253. *Id.* at 660 (footnote omitted).

254. *Id.* at 661–62.

255. *Id.* at 662.

256. *Id.* at 669 (Blackmun, J., dissenting). The dissent also opined:

> But this is precisely what Secrist did. Secrist used Dirks to disseminate information to Dirks' clients, who in turn dumped stock on unknowing purchasers. Secrist thus intended Dirks to injure the purchasers of Equity Funding securities to whom Secrist had a duty to disclose. Accepting the Court's view of tippee liability, it appears that Dirks' knowledge of this breach makes him liable as a participant in the breach after the fact.

Id. at 671 (footnote omitted).

257. *Id.* at 669 n.4 (internal quotation marks omitted).

light were "feeble."[258] Dirks informed his clients before making any attempt to contact the SEC. To the minority, Dirks was no hero who brought to light a fraud, which otherwise might have gone undiscovered,[259] but, rather, a market professional who knew his actions would injure most of the shareholders[260] while enabling his clients to avoid a major loss.[261]

With respect to the law, the dissent, responding to the majority's holding that Dirks was not liable because Secrist did not obtain any personal benefit and thus did not violate his duty to Equity Funding, stated that "the Court imposes a new, subjective limitation on the scope of the duty owed by insiders to shareholders. The novelty of this limitation is reflected in the Court's lack of support for it."[262] The dissent asserted that "[t]he fact that the insider himself does not benefit from the breach does not eradicate the shareholder's injury."[263] According to the dissent, "[t]he duty is addressed not to the insider's motives, but to his actions and their consequences on the shareholder. Personal gain is not an element of the breach of this duty."[264] The scope of the duty is circumscribed by the requirement of scienter.

3. The Failed Policy Chosen by the Majority in *Dirks*

Consider now the differing opinions from a policy standpoint. In this case, there were two interests in conflict: those of the shareholders and the investing public that bought from Dirks's tippees, on the one hand, and those of analysts and others who wished to take advantage of non-public information they had obtained, on the other hand. The purpose of the securities laws in general is to insure "the maintenance of fair and honest markets,"[265] and of § 10 in particular to support "the public interest" and insure "the protection of investors."[266] Consequently, whose interests should the Supreme Court consider paramount: (a) those of Dirks and his tippees who saved millions of dollars by bailing out early on the basis of material non-public information, or (b) those of (i) the shareholders, who were unaware of Dirks's information and suffered the precipitous drop in price, and (ii) the investors, who bought from the

258. *Id.* at 670.

259. As stated earlier, state officials were in the process of shutting down Equity Funding's scam. *See supra* note 238; *Dirks*, 463 U.S. at 668–69 (Blackmun, J., dissenting).

260. Once disclosure is publicly made, all shareholders have a comparable opportunity to sell as the price declines. As a result of Dirks's actions, the uninformed shareholders were not informed until after the stocks had plummeted. *Id.* at 669–70.

261. *Id.* at 670.

262. *Id.* at 671.

263. *Id.* at 673. The dissent added: "It makes no difference to the shareholder whether the corporate insider gained or intended to gain personally from the transaction; the shareholder still has lost because of the insider's misuse of nonpublic information." *Id.* at 674.

264. *Id.* at 674 (footnote omitted).

265. 15 U.S.C. § 78b (2012).

266. 15 U.S.C. § 78j (2012).

tippee institutions only to find that they owned stock in a defunct company?

While the majority favored the analysts and institutions that wanted to make a fast buck, the dissent championed the uninformed shareholders and investors. For the majority, opportunists are favored over the investing public. This is a pattern that continued through the fourth trilogy in *Central Bank*, *Stoneridge Investment Partners*, and *Janus Capital*.[267]

The majority in *Dirks*, as it continued its pattern of cutting back on the scope of Rule 10b-5, was overly enamored of the importance of analysts to the functioning of the securities markets. The majority rejected the SEC position that those receiving material, non-public information from a corporate insider had a duty to disclose or abstain (more properly, abstain until disclosed) on that basis that such an approach "could have an inhibiting influence on the role of market analysts."[268] According to the majority:

> It is commonplace for analysts to 'ferret out and analyze information,' and this often is done by meeting with and questioning corporate officers and others who are insiders. And information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities. The analyst's judgment in this respect is made available in market letters or otherwise to clients of the firm.[269]

The Court opined—erroneously as we will see[270]—that "[i]t is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally."[271] While the majority recognized that Dirks's startling information "required no analysis,"[272] it opined that "the principle at issue here extends beyond these facts."[273]

In taking this position, the Court was not embodying a conservative approach because the majority focused not upon the facts of the case before it, but rather "legislated," as it did in *Blue Chip Stamps*,[274] to solve a problem not then presented to the Court. Moreover, the majority opinion reflects a lack of understanding of the corporation's role in disclosing material information and the analyst's role in uncovering information.

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267. *See infra* Part IV.
268. *Dirks*, 463 U.S. at 658 (majority opinion).
269. *Id.* at 658–59 (footnote omitted) (citation omitted).
270. *See infra* text at notes 275–76.
271. *Dirks*, 463 U.S. at 659.
272. *Id.* at 658 n.18.
273. *Id.*
274. *See supra* text accompanying note 128–32.

Contrary to the opinion, it is possible to disclose material information in a public fashion. The SEC has adopted Regulation F-D,[275] which requires that when a corporation or a person acting on its behalf discloses material, non-public information, it shall simultaneously disclose such information to the public or, in the case of inadvertent disclosure, as promptly as possible.[276]

With respect to the proper role of analysts, the SEC opinion in *Dirks* should have provided insight to the Supreme Court as to what a legitimate analyst actually does:

> In this connection, it is important to recognize that this is not a case in which a skilled analyst weaves together a series of publicly available facts and non-material inside disclosures to form a "mosaic" which is only material after the bits and pieces are assembled into one picture. We have long recognized that an analyst may utilize non-public, inside information which in itself is immaterial in order to fill in "interstices in analysis." That process is legitimate even though such "tidbits" of inside information "may assume heightened significance when woven by the skilled analyst into the matrix of knowledge obtained elsewhere," thereby creating material information.[277]

The SEC opinion, while recognizing the importance of an analyst's work and the legitimacy of tracking down rumors, concluded that "the analyst's role, like that of any other person, is constrained by the well-established proscriptions of the antifraud provisions of the federal securities laws, and we cannot condone the unfairness inherent in the selective dissemination of material, inside information prior to its public disclosure."[278]

Clearly the position of the SEC and the dissent is true to the purposes of the securities laws, while the position of the majority undercuts the protection of investors.

Subsequent events in the 2000s have brought into question the integrity of the analyst community and the quality of its analysis. Enron was a highly-touted stock that also was the darling of the analysts until Bethany McLean questioned its business model and earnings.[279] Thereafter, Enron's scam was revealed and its stock became worthless.[280] Later, after the dot-com bubble burst, New York Attorney General Eliot Spitzer uncovered a flood of recommendations by analysts touting stocks for the

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275. 17 C.F.R. § 243.100 (2013).

276. 17 C.F.R. § 243.100(a) (2013).

277. Raymond L. Dirks, Exchange Act Release No. 34-17480, 1981 WL 36329, at *7 (Jan. 22, 1981) (footnote omitted).

278. *Id.* at *10.

279. Bethany McLean, *Is Enron Overpriced?*, FORTUNE, Mar. 5, 2001, *available at* http://money.cnn.com/2006/01/13/news/companies/enronoriginal_fortune/.

280. *In re* Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002).

public to buy that they were at the same time disparaging as "crap" to their colleagues.[281] Their motivation frequently was to obtain underwriting commitments for the investment banking side of their firm.[282] Sometimes the motivation was merely to get a daughter into nursery school.[283] The Court should no longer be overly solicitous about holding analysts to account.

4. The Problem of Tone, the Explosion of Insider Trading, and the Congressional Response

In the course of the *Dirks* opinion, the Court asserted:

1. "[O]nly some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information."[284]

2. "Judge Wright correctly read our opinion in *Chiarella* as repudiating any notion that all traders must enjoy equal information before trading."[285]

3. "[T]he disclose-or-refrain duty is extraordinary."[286]

4. "[A] duty [to disclose] arises . . . not merely from one's ability to acquire information because of his position in the market."[287]

5. "All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders."[288]

6. "Absent some personal gain, there has been no breach of duty to stockholders."[289]

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281. *See* Christopher Lucas, Note, *The Triangle Shirtwaist Fire and the Merrill Lynch Analyst Ratings Scandal: Legislative and Prosecutorial Responses to Corporate Malfeasance*, 1 BROOK. J. CORP. FIN. & COM. L. 449, 463–64 (2007) (Spitzer found emails describing stock as "a POS [piece of shit]" from an analyst that publicly described that same stock as "an attractive investment" (alteration in original) (internal quotation marks omitted)); Joseph Nocera & Abrahm Lustgarten, *Wall Street on the Run*, FORTUNE, June 14, 2004, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2004/06/14/372633/ (explaining the settlements reached between the New York attorney general and Wall Street investment banks after Spitzer learned of analysts' routine betrayal of investors); Complaint ¶ 86, SEC v. Blodget, No. 03 Civ.2947(WHP), 2004 WL 435059 (S.D.N.Y. Mar. 10, 2004), *available at* http://www.sec.gov/litigation/complaints/comp18115b.htm (explaining that the public research reports by analysts were inconsistent with the analysts' privately expressed negative views).

282. *See* Pat Huddleston II et al., *Protect Investors from Brokers' Stock Scams*, TRIAL, Apr. 2003, at 38 (explaining that analysts recommended stocks in order to secure investment-banking business, with no regard for the true financial conditions of the corporations).

283. Gretchen Morgenson & Patrick McGeehan, *Wall St. and the Nursery School: A New York Story*, N.Y. TIMES, Nov. 14, 2002, at A1.

284. Dirks v. SEC, 463 U.S. 646, 657 (1983).

285. *Id.*

286. *Id.*

287. *Id.* at 657–58 (second alteration in original).

288. *Id.* at 661–62.

289. *Id.* at 662.

> 7. "*Chiarella* made it explicitly clear there is no general duty to forgo market transactions 'based on material, nonpublic information.'"[290]
>
> 8. "In one sense, as market values fluctuate and investors act on inevitably incomplete or incorrect information, there always are winners and losers; but those who have 'lost' have not necessarily been defrauded."[291]

These observations created a tone that arguably contributed to a rash of insider trading that followed the *Chiarella* and *Dirks* decisions in the 1980s. A Wall Street Journal reporter in *Den of Thieves* extensively chronicled the upsurge in insider trading.[292] Correlation does not mean causation but pronouncements such as those made by the Supreme Court could well have led to disdain by many in the investment banking community toward any proscription against insider trading. There is no question that insider trading increased markedly in the 1980s. In 1984, a Congressional Report opined that "[i]nsider trading has become a more widespread problem in recent years," and the SEC "has brought more such cases during the past four years than in all previous years combined."[293] The Report also opined that "if the *Dirks* decision is properly and narrowly construed by the courts, the Commission's insider trading program will not be adversely affected."[294]

In response to the surge of insider trading, Congress twice took action in an attempt to curtail this activity: in 1984, with the Insider Trading Sanctions Act,[295] and in 1988, with the Insider Trading and Securities Fraud Enforcement Act.[296] The 1984 Act incorporated a potential treble damage liability for those who engaged in insider trading.[297] Decisions by the circuit courts first had looked askance at the "draconian" liability when damages were measured, not by the benefit to the guilty party but by the loss suffered by all investors who traded contemporaneously,[298] and then limited recovery to the benefits obtained by a defendant who illegally traded.[299] The problem with merely requiring the defendant to

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290. *Id.* at 666 n.27 (quoting Chiarella v. United States, 445 U.S. 222, 233 (1980)).

291. *Id.*

292. *See generally* JAMES B. STEWART, DEN OF THIEVES (1991).

293. H.R. REP. NO. 98-355, at 5 (1983).

294. *Id.* at 15.

295. Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264.

296. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677.

297. Insider Trading Sanctions Act of 1984 § 2(A).

298. In *Fridrich v. Bradford,* one insider's profit was $13,000 but was subjected by the district court to a judgment of $361,186.75. 542 F.2d 307, 308 (6th Cir. 1976). In reversing the lower court, the Sixth Circuit characterized this as "Draconian liability." *Id.* at 309 (internal quotation marks omitted). The concurring opinion suggested that liability only attach to those plaintiffs who traded "contemporaneously" with the insider. *Id.* at 327 (Celebrezze, J., concurring). The 1988 Act adopted this approach. Insider Trading and Securities Fraud Enforcement Act of 1988 § 3(b). *Fridrich* also questions whether an insider who did not abstain "caused" the party on the other side of the transaction to trade. *Fridrich,* 542 F.2d at 323.

299. Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 173 (2d Cir. 1980).

disgorge his or her profits is that there is no downside (other than a potential criminal sanction) to engaging in insider trading. If you do not get caught, you win; if you do get caught, you merely return your ill-gotten gain. To put additional teeth into insider trading enforcement, the SEC requested, and Congress conferred, the treble damage penalty provision.

Notwithstanding this new enforcement tool, in 1988 another Congressional Report asserted that "the last few years have seen a dramatic increase in insider trading cases, including cases against some of the most prominent officials in Wall Street investment banking firms."[300] Accordingly, Congress enacted the Insider Trading and Securities Fraud Enforcement Act of 1988. This act expanded the civil penalty provision to include broker-dealers, investment advisors and others who failed to take appropriate steps to prevent insider trading by incorporating the prior penalty provisions into a new § 21A of the 1934 Act.[301] Because the logic of the *Fridrich v. Bardford* decision[302] had effectively undercut the causation aspect of private insider trading litigation, Congress resuscitated this cause of action by providing for insider liability to contemporaneous traders.[303] But as damages were limited by the insiders benefit, there has been little incentive to utilize this provision unless the insider's gain was very substantial.

C. Carpenter: *The Uncertain Status of the Misappropriation Theory*

Carpenter v. United States[304] was another case involving unusual facts. David Carpenter, a roommate of R. Foster Winans, was a bit player in a fraud concocted by Winans and Peter Brandt, a distinguished broker with Kidder Peabody.[305] Winans wrote an influential column, "Heard on the Street," for the Wall Street Journal. In his column, Winans applauded certain stocks and downplayed others. Stocks frequently rose after a positive column and fell after a negative one. Winans tipped Brandt as to the publication date and nature of the column and Brandt would buy before a positive column and go short before a negative one.[306] After the column was published and the stock moved, Brandt would close out the transaction. Over a four-month period, the scheme netted almost $700,000.[307]

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300. H.R. REP. NO. 100-910, at 11 (1988).
301. Insider Trading and Securities Fraud Enforcement Act of 1988 § 21A.
302. *Fridrich*, 542 F.2d at 318–20, 323.
303. Insider Trading and Securities Fraud Enforcement Act of 1988 § 20A.
304. 484 U.S. 19 (1987).
305. Kenneth Felis, another participant in scheme, was also a broker at Kidder Peabody. *Id.* at 20–22.
306. The story of the scheme is detailed in Winans's book. R. FOSTER WINANS, TRADING SECRETS: AN INSIDER'S ACCOUNT OF THE SCANDAL AT THE WALL STREET JOURNAL (1986). From reading the book, one could glean that the purpose was to punish Peter Brandt, an unscrupulous social climber, who was the chief prosecution witness against Winans and the other defendants. *See Broker in Winans Case Is Sentenced*, N.Y. TIMES, Feb. 27, 1988, at 137.
307. *Carpenter*, 484 U.S. at 23.

In 1987, the decision of the Supreme Court in the pending case of *Carpenter* was eagerly awaited.[308] There were some who argued that insider trading was a "victimless crime," that it moved the stock market in the "correct" direction, that prohibiting it was bad policy,[309] and that it was an appropriate way to compensate entrepreneurs and corporate management.[310] On the other hand, there was hope that the Supreme Court would affirm the misappropriation theory that Justice Burger had articulated in his dissent in *Chiarella*.[311] The decision turned out to be anticlimactic, however, since the Court affirmed the convictions under Rule 10b-5 due to the Court splitting 4:4 on this issue.[312] The 4:4 split was occasioned by the difficulty some Justices had in accepting that the fraud against the *Wall Street Journal*, namely misappropriating its printing schedule to "time" the trading, was "in connection with" a securities transaction.

It was not until ten years later that the Court upheld the misappropriation theory under Rule 10b-5 and affirmed the conviction of an attorney in a law firm that represented the bidder in a potential takeover.[313] The attorney had purchased stock and call options of the target company based upon his knowledge of the pending transaction. When the stock rose dramatically after the tender offer was announced, the attorney made more than $4.3 million.[314]

In *United States v. O'Hagan*, Justice Scalia dissented on the basis that § 10(b) requires the "manipulation or deception of a party to a securities transaction,"[315] while Justice Thomas, joined by Chief Justice Rehnquist, dissented on the basis that the majority opinion and the SEC

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308. *See, e.g.*, Stuart Taylor, Jr., *Winans Case Taken by Justices*, N.Y. TIMES, Dec. 16, 1986, at D1; James B. Stewart, *Death of a Theory? Supreme Court May Revamp Insider-Trading Law*, WALL ST. J., Sept. 30, 1987.

309. Henry G. Manne, *Insider Trading and Property Rights in New Information*, 4 CATO J. 933, 935–37 (1985) (internal quotation marks omitted). For a later view of this thinking, see Donald J. Boudreaux, *Learning to Love Insider Trading*, WALL ST. J., Oct. 24, 2009, at W1.

310. I offered to debate Professor Manne on this point at his Law and Economics program at Dartmouth College. He declined. To rebut his position, consider *Diamond v. Oreamuno*, where two entrepreneurs, knowing that earnings would drop sharply because of a sharp increase in costs, sold 56,000 shares at $28; the market dropped to $11 when the adverse earnings were announced. 248 N.E.2d 910, 911 (1969). Is this appropriate compensation?

Nor is insider trading victimless. The conceptual problem is that the injury is to the same side of the market. The person on the other side of the transaction actually benefits because, if buying, the sale by the insider drops the price, whereas, if selling, the purchase by the insider raises the price. But the person on the same side as the insider is always "late to the party." In *Oreamuno*, the insider got out at $28, whereas the public could only sell at $11. If disclosure were first made, the insider would need to compete with other sellers to get out as the market began to plunge. It is likely that an exchange would stop trading until the market digested the news and all would then have equal opportunity at the new price.

311. *See supra* Part III.A.

312. The Court unanimously affirmed the convictions under the mail and wire fraud statute. *Carpenter*, 484 U.S. at 24.

313. United States v. O'Hagan, 521 U.S. 642, 642–44 (1997).

314. *Id.*

315. *Id.* at 679 (Scalia, J., dissenting).

failed "to provide a coherent and consistent interpretation" of the "in connection with" requirement.[316] In particular, they found inconsistent the position that a misappropriation of information would give rise to a Rule 10b-5 action, but a misappropriation of money would not.[317] The distinction drawn by the majority was that the fraud regarding information occurs when the information is wrongfully used, whereas the fraud in misappropriating money occurs at the time of embezzlement, irrespective of whether the money is later used to purchase securities.[318]

There is another weakness in the misappropriation theory that was recognized by the Second Circuit in *Carpenter*. Because Winans's fraud was converting the information of his employer as to printing schedules, the court observed that "the *Wall Street Journal* or its parent, Dow Jones Company, might perhaps lawfully disregard its own confidentiality policy by trading in the stock of companies to be discussed in forthcoming articles."[319] But the court felt assured that "a reputable newspaper, even if it could lawfully do so, would be unlikely to undermine its own valued asset, its reputation, which it surely would do by trading on the basis of its knowledge of forthcoming publications."[320]

That this would even be an issue illustrates the absurdity of relying upon a common law duty to a person or entity that is not a party to a securities transaction to bring a lawsuit based upon, or "in connection with," a securities transaction. This in turn illustrates the absurdity in *Chiarella* of requiring a common law duty to the person on the other side of the transaction in order to establish deceit. How much more sensible would the law have been if *Chiarella* had truly followed *Cady, Roberts* and rejected reliance on common law principles, reframed "disclose or abstain" to "abstain until disclosable," and recognized that market professionals have such a duty when they knowingly [scienter] trade on material, non-public information?

The cases in this third trilogy reflect a reactionary approach by the Supreme Court. The policy of the securities laws was given lip-service, but basically ignored. A well-reasoned decision, such as *Cady, Roberts*, was cited to support the Court's decision when, in fact, it was diametrically opposed to the rationale in both *Chiarella* and *Dirks*. The Court took the inept phrasing in *Texas Gulf Sulfur*—"disclose or abstain"—and constrained its application by appending to it a common law duty requirement. A flood of insider trading ensued. As stated above, while correlation is not necessarily causation, the tone of the Court's decision, and

316. *Id.* at 680 (Thomas, J., dissenting).
317. *Id.* at 683–84 (quoting the Government's argument at oral hearing).
318. *Id.* at 655–57 (majority opinion).
319. United States v. Carpenter, 791 F.2d 1024, 1026, 1033 (2d Cir. 1986).
320. *Id.* at 1033.

the roadblocks to insider trading enforcement that it created, certainly did nothing to inhibit the explosion of insider trading.

IV. THE FOURTH TRILOGY: INSULATING COLLATERAL PARTICIPANTS FROM LIABILITY

The last trilogy of Supreme Court cases dealing with the liability of collateral participants is unique in that fourteen years passed between the first and second decision; however, the second and third quickly followed each other. The Supreme Court saw its most recent decision, *Janus Capital Group, Inc.*, as a necessary outcome if its decision in *Central Bank of Denver, N.A.*[321] was not to be undermined.[322] The Court in *Stoneridge Investment Partners* took essentially the same tack.[323] Because *Central Bank* is both significant in its own right, as well as essentially determinative of the subsequent two cases, it is important to understand the shaky foundation upon which it sits.

A. Central Bank*: The Demise of Aiding and Abetting*

The primary violator in *Central Bank* was a real estate development company that issued bonds in 1986 and planned a new issue in 1988.[324] The bond indenture required that the bonds be secured by real estate valued at 160% of the debentures.[325] Central Bank was the indenture trustee under both the existing and proposed bond offerings.[326] Early in 1988, Central Bank secured a supposedly updated appraisal from the development's appraiser.[327] The values were essentially unchanged from two years earlier, notwithstanding a drop in real estate prices in the Colorado Springs area and a number of foreclosures.[328] The underwriter under the 1986 offering wrote to Central Bank, informed the Bank that the underwriter believed that the appraisal was inflated and that the indenture covenants were violated, and requested that Central Bank commission a new appraisal by an independent appraiser, as it had the authority to do under

321. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

322. Janus Capital Grp., Inc. v. First Derivatives Traders, 131 S. Ct. 2296, 2302 (2011). The Court in *Janus Capital* was unaware of the fact that after its decision in *Central Bank*, the Enron disaster and other massive corporate corruption cases ensued, followed by a major financial collapse, triggered in substantial part by the fraudulent creation and marketing of innovative financial securities. *See* Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243 (2011). While correlation is not necessarily causation, *Central Bank*, by eliminating aiding and abetting liability, arguably turned professionals, such as attorneys, who should be gatekeepers into hired guns. *See infra* notes 432–44 and accompanying text.

323. Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 162–63 (2008).

324. *Cent. Bank*, 511 U.S. at 167.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

the indenture.[329] The Bank asked its own appraiser to examine the appraisal, and he also thought the appraisal was inflated. The Bank then met with the developer and agreed to postpone the new appraisal until after the 1988 offering. The new offering went forward and shortly thereafter the development company defaulted.[330]

The primary violation was the misrepresentations about the value of the real estate by the development company. Central Bank was charged with aiding and abetting [331]and the litigation revolved around the second element of aiding and abetting: Central Bank argued that it had no duty under the indenture to get a new appraisal and that, absent such a duty, recklessness was insufficient; without a duty, actual knowledge of the primary fraud was necessary.[332] The Supreme Court went beyond this argument, however, and determined that aiding and abetting liability did not exist in a Rule 10b-5 action.[333]

1. Reactionary Judicial Decision Making

At the outset, it is paradoxical, as well as disingenuous, for a supposedly conservative court to engage in reactionary judicial activism. But that is exactly what the Court in *Central Bank* did. First, the issue decided by the Court was not the one litigated in the courts below, nor was it the issue raised by the parties on appeal. The issue below, and which the parties raised on appeal, dealt with the defendant's knowledge of, or recklessness in not knowing, the primary violation.[334] The parties never questioned the existence of a cause of action for aiding and abetting. Nevertheless, on its own motion, the Court directed the parties to brief this issue.

The next aspect of reactionary judicial activism was that all eleven circuits had accepted aiding and abetting liability.[335] When there is a split

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329. First Interstate Bank of Denver, N.A. v. Pring, 969 F.2d 891, 894 (10th Cir. 1992), *rev'd sub nom.* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

330. *Id.* at 895.

331. Justice Stevens, in his dissent, set forth the elements of aiding and abetting liability:

> The Courts of Appeals have usually applied a familiar three-part test for aider and abettor liability, patterned on the Restatement of Torts formulation, that requires (i) the existence of a primary violation of § 10(b) or Rule 10b–5, (ii) the defendant's knowledge of (or recklessness as to) that primary violation, and (iii) "substantial assistance" of the violation by the defendant.

Cent. Bank, 511 U.S. at 194 (Stevens, J., dissenting).

332. *Cent. Bank*, 511 U.S. at 175–76 (majority opinion).

333. *Id.* at 177.

334. *Id.* at 190. The Grant of Certiorari limited review to Question 2 presented by the petition and directed the parties to brief and argue the following additional question: "[W]hether there is an implied private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5." Scott M. Murray, Comment, Central Bank of Denver v. First Interstate Bank of Denver*: The Supreme Court Chops a Bough from the Judicial Oak: There Is No Implied Private Remedy to Sue for Aiding and Abetting Under Section 10(b) and SEC Rule 10b-5*, 30 NEW ENG. L. REV. 475, 505 (1996) (internal quotation marks omitted).

335. *See, e.g.*, Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 986 (10th Cir. 1992); K & S P'ship v. Cont'l Bank, N.A., 952 F.2d 971, 977 (8th Cir. 1991); Levine v. Diamanthuset, Inc.,

among the circuits, the Supreme Court often resolves it. But aiding and abetting liability was well-settled law. As Justice Stevens pointed out in his dissent:

> In *hundreds* of judicial and administrative proceedings in every Circuit in the federal system, the courts and the SEC have concluded that aiders and abettors are subject to liability under § 10(b) and Rule 10b-5. . . . While we have reserved decision on the legitimacy of the theory in two cases that did not present it, all 11 Courts of Appeals to have considered the question have recognized a private cause of action against aiders and abettors under § 10(b) and Rule 10b-5.[336]

Central Bank did not resolve unsettled law but rather unsettled very resolved law. While the majority stated that it "granted certiorari to resolve the continuing confusion over the existence . . . of the § 10(b) aiding and abetting action[,]" the only confusion as to its existence was in the mind of the majority.[337]

The Court in the *Stoneridge Investment Partners* decision sought to justify its decision by asserting "[t]his is not a case in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability."[338] But that was exactly what had occurred prior to *Central Bank* with respect to aiding and abetting liability. Section 10(b) was enacted in 1934, Rule 10b-5 was promulgated in 1942, and a private cause of action recognized in 1946, shortly after World War II ended.[339] Aiding and abetting liability in Rule 10b-5 actions was recognized at least as early as 1963,[340] and the Supreme Court first considered Rule 10b-5 in 1969.[341] Congress substantially revised the 1934 Act in 1964[342]

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950 F.2d 1478, 1483 (9th Cir. 1991); Schatz v. Rosenberg, 943 F.2d 485, 496–97 (4th Cir. 1991); Fine v. Am. Solar King Corp., 919 F.2d 290, 300 (5th Cir. 1990); Schneberger v. Wheeler, 859 F.2d 1477, 1480 (11th Cir. 1988); Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir. 1987), *cert. denied sub nom.* Moore v. Frost, 483 U.S. 1006, 107 S. Ct. 3231 (1987); Cleary v. Perfectune, Inc., 700 F.2d 774, 777 (1st Cir. 1983); IIT, An Int'l Inv. Trust v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980); Monsen v. Consol. Dressed Beef Co., 579 F.2d 793, 799 (3d Cir. 1978). The only court not to have squarely recognized aiding and abetting in private § 10(b) actions has done so in an action brought by the SEC, *see* Dirks v. SEC, 681 F.2d 824, 844–45 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983), and has suggested that such a claim was available in private actions. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 35–36 (D.C. Cir. 1987). The Seventh Circuit's test differs markedly from the other circuits' in that it requires that the aider and abettor "commit one of the 'manipulative or deceptive' acts prohibited under section 10(b) and rule 10b-5." Robin v. Arthur Young & Co., 915 F.2d 1120, 1123 (7th Cir. 1990).

336. *Cent. Bank*, 511 U.S. at 192 (Stevens, J., dissenting).

337. *Id.* at 170 (majority opinion).

338. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 163 (2008).

339. *See supra* Part I.A.

340. *See, e.g.*, Burley & Co., Exchange Act Release No. 34-3838, 23 SEC Docket 461 (Aug. 5, 1946).

341. *See* SEC v. Nat'l Sec., Inc., 393 U.S. 453, 455 (1969).

342. Securities Acts Amendments of 1964, Pub. L. No. 88-467, 78 Stat. 565. These amendments expanded the reach of disclosure requirements under the 1934 Act, by making the registration, periodic reporting, proxy, and insider trading provisions applicable to large over-the-counter companies in addition to listed companies which were previously covered by the Act. The amendments

and again in 1975,[343] well aware of aiding and abetting liability in Rule 10b-5 actions. The doctrine itself has been recognized for a century,[344] and was formulated in the Restatement of Torts in 1939.[345]

2. The Flawed Analysis

Judicial activism could be accepted if it made sense from a policy standpoint or if it were supported by sound judicial reasoning. *Central Bank* met neither criterion. From a policy standpoint, the law should discourage wrongdoing, not insulate it from accountability. From a jurisprudential perspective, the *Central Bank* opinion was so outcome determinative that it discredited the Court's objectivity.

The Court began its analysis by recognizing that "Congress did not create a private § 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme."[346] However, with respect to the type of conduct prohibited, the statutory language controls. According to the Supreme Court, because the statutory language controls, this "bodes ill" for the existence of aiding and abetting liability as "Section 10(b) does not in terms mention aiding and abetting."[347] This is absurd reasoning. The Court acknowledged that the private cause of action was judicially created and thus Congress provided no guidance about its elements. Why then would any rational person expect Congress to deal with whether a remedy it did not create would be complemented by aiding and abetting liability for those who assist a primary violator?

Viewed from a different perspective, the argument can be made that Congress did anticipate aiding and abetting liability under § 10. This section, by its terms, defines "unlawful" activity, and unlawful activity can be prosecuted criminally by the U.S. Attorney. The Crimes and Criminal Procedure section of the U.S. Code specifically provides: "Whoever commits an offense against the United States or aids, abets,

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also imposed increased standards and disciplinary controls for broker-dealers in securities. For a thorough analysis of the 1964 Amendments, see Richard M. Phillips & Morgan Shipman, *An Analysis of the Securities Acts Amendments of 1964*, 1964 DUKE L.J. 706 (1964).

343. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97. These amendments further expanded the reach of the SEC to oversee self-regulatory organizations and develop a national system for clearance and settlement of securities transactions. They also expanded the reporting requirements of large financial institutions and generally sought to eliminate obstacles to competition within the securities industry. For a thorough analysis of the 1975 Amendments, see John G. Gillis, *Securities Law and Regulation: Securities Acts Amendments of 1975*, 31 FIN. ANALYSTS J. 12 (1975).

344. THOMAS MCINTYRE COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 244 (3d ed. 1906).

345. 4 RESTATEMENT OF THE LAW OF TORTS: PERSONS ACTING IN CONCERT § 876(b) (1939).

346. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173 (1994).

347. *Id.* at 175 (internal quotation mark omitted).

counsels, commands, induces or procures its commission, is punishable as a principal."[348]

There is also further statutory language that suggests that aiding and abetting liability does not affront the statutory scheme: Section 10(b) forbids conduct that "directly or indirectly" is "manipulative or deceptive."[349] The Court rebuts this argument by asserting that "federal courts have not relied on [this language] when imposing aiding and abetting liability."[350] This is because all federal courts prior to *Central Bank* did not find it necessary to construe the statute with regard to aiding and abetting liability as they were dealing with a judicially created cause of action. But, if the statute is viewed with an open mind, rather than an outcome-determinative mindset, there is little basis for rejecting the cause of action.

The Court then asserts that Congress knew how to create aiding and abetting liability. Congress also knows how to pass a budget—or at least it did.[351] But Congress's knowledge of neither is relevant to a judicially created cause of action. The Court then concluded its analysis of the statute by asserting that the Court could not amend the statute by "creat[ing] liability for acts that are not themselves manipulative or deceptive."[352] In so doing, the Court fails to understand the difference between primary and secondary liability. It is the primary violator who engages in manipulative or deceptive conduct. The aider and abettor is secondarily liable because the person assists the primary violator. An essential element of aiding and abetting liability is that there must be a primary violation that would encompass manipulative or deceptive conduct.

3. Distinction Between Express Negligence Causes of Action and an Implied Cause of Action Requiring Recklessness

After it completed its nonsensical examination of the statute to determine whether Congress provided for aiding and abetting liability with regard to a judicially created cause of action, the Court then fantasized whether, had Congress created a private cause of action, it would have provided for aiding and abetting. The Court examined the private causes of action that Congress expressly created and noted that none of them provided for aiding and abetting liability. The Court accordingly concluded that "[t]here is no reason to think that Congress would have at-

348. 18 U.S.C. § 2(a) (2012).

349. *See* 15 U.S.C. § 78j (2012).

350. *Cent. Bank*, 511 U.S. at 176.

351. *See* Len Burman, *Budget Brinkmanship in Congress Must End*, CHRISTIAN SCI. MONITOR (Dec. 18, 2011), http://www.csmonitor.com/Business/Tax-VOX/2011/1218/Budget-brinkmanship-in-Congress-must-end (explaining that Congress consistently followed a successful budget process beginning in 1974, but that in five of the past twelve years, Congress has not passed a budget resolution at all, instead relying on emergency measures and last-minute stop-gaps).

352. *Cent. Bank*, 511 U.S. at 177–78.

tached aiding and abetting liability only to § 10(b) and not to any of the express private rights of action in the Act."[353]

Unfortunately for the Court, there is a very significant reason to distinguish between § 10(b) and the express private rights in the 1933 and 1934 securities acts—a reason the Court itself created almost twenty years earlier. In *Ernst & Ernst*, the Court determined that the language of § 10(b) precluded a private action under Rule 10b-5 from sounding in negligence, thereby requiring scienter[354]—today recklessness.[355] As the Court itself recognized, aiding and abetting liability originated in criminal law,[356] and its extension to negligence cases is of relatively recent origin.[357] Since the express private causes of action sound in negligence, it is not surprising that Congress did not attach aiding and abetting liability. But, in the express private causes of action, Congress did cast a broad net in terms of liability. For example, § 11 of the 1933 Act imposes liability, not only upon the issuer, but also upon officers, directors, investment bankers, and experts named in the registration statement.[358] In other circumstances, some of these named defendants could be considered aiders and abettors.

One of the private actions listed by the Court was § 9 of the 1934 Act.[359] Because liability is imposed on those who "willfully participate" in the proscribed manipulation, this is not a negligence provision. But it also does not negate a policy accepting aiding and abetting liability. While § 10 imposes liability upon those who "use or employ" manipulative or deceptive acts, § 9 imposes liability upon one who "willfully participates" in manipulation. The conduct of the suppliers in *Stoneridge Investment Partners*, who conspired with the issuer to inflate its earnings, was challenged on the basis that they directly and willfully participated in the fraud.[360] Section 9, by its terms, covers "willful" participants. Yet, on the basis of *Central Bank*, such liability was rejected even though the 1934 Act clearly does not reflect a policy against liability for willful participants.

The Supreme Court, in *Central Bank*, also made short shrift of the argument that the 1984 and 1988 legislative reports approved of aiding and abetting liability under Rule 10b-5.[361] While the Court characterizes

353. *Id.* at 180.

354. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 185 (1976).

355. *Id.* at 193 n.12 ("In this opinion the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud. In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act.").

356. *Cent. Bank*, 511 U.S. at 181.

357. *See id.* at 181–82.

358. 15 U.S.C. § 77k(a) (2012).

359. *Cent. Bank*, 511 U.S. at 178.

360. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 148 (2008).

361. *Cent. Bank*, 511 U.S. at 185 (citing H.R. REP. NO. 100-910, at 27 n.23 (1988)) (noting that a certain provision did "not affect the availability of any other theories of liability, such as aiding and

the Committee reports as making "oblique references" to aiding and abetting,[362] the references are hardly oblique. For example, the 1984 Report stated: "The committee endorses the judicial application of the concept of aiding and abetting liability to achieve the remedial purposes of the securities laws."[363]

The Court also states that "the interpretation given by one Congress (or a committee . . . thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[364] But, paradoxically, this is in effect what the Supreme Court itself has been doing. In the late 1970s, the Court began restricting the circumstances in which a private cause of action would be implied.[365] It then uses its recent antipathy toward private courses of action to restrict causes of action developed under an earlier Supreme Court regime in which the law at that time favored the implication of a remedy.

In *Central Bank*, the Court downplayed the fact that Congress had amended the securities laws many times without rejecting the judicial doctrine of aiding and abetting. But, previously with respect to Rule 10b-5, the Supreme Court had stated that "[t]he longstanding acceptance by the courts, coupled with Congress' failure to reject *Birnbaum's* reasonable interpretation . . . argues significantly in favor of acceptance of the *Birnbaum* rule by this Court."[366] Now, let us rewrite the prior sentence, substituting "aiding and abetting" for "Birnbaum": "The longstanding acceptance by the courts, coupled with Congress' failure to reject [*aiding and abetting*], argues significantly in favor of [*aiding and abetting* liability]." Or let us take the same tack to the Court's language in *Herman & MacLean*, substituting aiding and abetting for "Section 10(b)":

> In 1975[,] Congress enacted the "most substantial and significant revision of this country's Federal securities laws since the passage of the Securities Exchange Act in 1934." When Congress acted, federal courts had consistently and routinely permitted a plaintiff to proceed [*under aiding and abetting*]. In light of this well-established judicial interpretation, Congress' decision to leave [*aiding and abetting*] intact suggests that Congress ratified [*aiding and abetting liability*].[367]

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abetting"). "Current law generally imposed secondary liability on persons who aid and abet the inside trader." H.R. REP. NO. 98-355, at 10 (1983).

362. *Cent. Bank*, 511 U.S. at 185.

363. H.R. REP. NO. 98-355 (1983), *reprinted in* 1984 U.S.C.C.A.N. 2274, 2283.

364. *Cent. Bank*, 511 U.S. at 185 (internal quotation mark omitted).

365. *See* Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 622 F.2d 216 (6th Cir. 1980), *aff'd*, 456 U.S. 353 (1982); Cannon v. Univ. of Chi., 441 U.S. 677, 677–78 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 560 (1979); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 186 (1976); Cort v. Ash, 422 U.S. 66, 67 (1975).

366. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975).

367. Herman & MacLean v. Huddleston, 459 U.S. 375, 384–86 (1983) (footnotes omitted) (citation omitted).

Apparently, the guiding principle for this Court is "[a] foolish consistency is the hobgoblin of little minds."[368] The opinion is an exemplar of justification, not thoughtful and objective analysis. As will be developed in the balance of this Article, if there is a guiding principle for the Court in these cases, it is protecting wrongdoers at the expense of the public investor.

B. Stoneridge*: Direct Participant Liability*

1. The Contrast Between *Central Bank* and *Stoneridge*

The facts in *Stoneridge* bore no relation to those in *Central Bank*. *Central Bank* was a classic case of aiding and abetting. The elements of aiding and abetting traditionally have been (i) a primary violation, (ii) knowledge of the primary violation or recklessness in not being aware of the primary violation by the secondary actor, and (iii) substantial assistance to the primary violator by the secondary actor.[369]

In contrast to *Stoneridge*, as discussed earlier, the primary violator in *Central Bank* was a real estate development that had issued bonds in 1986 and planned a new issue in 1988, while Central Bank was the indenture trustee under both the existing and proposed bond offerings. The primary violation was the misrepresentations about the value of the real estate by the development company. Central Bank was charged with aiding and abetting, and it was with this issue that the Court dealt.

While it would be naïve to say that Central Bank did not benefit from deferring the appraisal and letting the second offering go forward—it had both a stake in the fees from acting as trustee under the second offering and a stake in keeping a client happy to secure business in the future—it clearly was not a direct participant in the primary violator's fraud. Nonetheless, had it fulfilled its responsibilities and promptly obtained a new appraisal, the fraud on the investors probably would not have occurred.[370]

Although it would be hard to label Central Bank as a crook, that is exactly what the defendants in *Stoneridge* were. And the Supreme Court was hardly unaware of the situation. It set out the facts as follows:

> For purposes of this proceeding, we take these facts, alleged by petitioner, to be true. Charter, a cable operator, engaged in a variety of fraudulent practices so its quarterly reports would meet Wall Street expectations for cable subscriber growth and operating cash flow. The fraud included misclassification of its customer base; delayed reporting of terminated customers; improper capitalization of costs

368. RALPH WALDO EMERSON, *Self-Reliance*, *in* ESSAYS (FIRST SERIES) 19 (Infomotions, Inc. 2001).

369. *See supra* note 331.

370. The Supreme Court apparently does not understand that it is engaging in risk allocation.

> that should have been shown as expenses; and manipulation of the company's billing cutoff dates to inflate reported revenues. In late 2000, Charter executives realized that, despite these efforts, the company would miss projected operating cash flow numbers by $15 to $20 million. To help meet the shortfall, Charter decided to alter its existing arrangements with respondents, Scientific–Atlanta and Motorola.
>
> . . . .
>
> Respondents supplied Charter with the digital cable converter (set top) boxes that Charter furnished to its customers. Charter arranged to overpay respondents $20 for each set top box it purchased until the end of the year, with the understanding that respondents would return the overpayment by purchasing advertising from Charter. The transactions, it is alleged, had no economic substance; but, because Charter would then record the advertising purchases as revenue and capitalize its purchase of the set top boxes, in violation of generally accepting accounting principles, the transactions would enable Charter to fool its auditor into approving a financial statement showing it met projected revenue and operating cash flow numbers. Respondents agreed to the arrangement.
>
> So that Arthur Andersen would not discover the link between Charter's increased payments for the boxes and the advertising purchases, the companies drafted documents to make it appear the transactions were unrelated and conducted in the ordinary course of business.[371]

2. The Arguments for and Against Direct Liability

Thus, Scientific-Atlanta and Motorola jointly conspired with Charter to engage in a series of transactions for the purpose of inflating earnings and thereby inflating the price of Charter's stock. Scientific-Atlantic and Motorola directly benefitted from the arrangement through increased revenues and profits, and their direct participation in the fraud was essential to carrying out the fraud. With respect to the fraud, they were arguably primary violators, not secondary violators. The secondary characterization comes into play only because the purpose of the fraud was to inflate Charter's earnings and it was Charter that "made" the misrepresentation to the investing public about its earnings.

Yet, the Court in *Stoneridge* blithely took the position that its decision was controlled by *Central Bank* and arguably extended it, stating: "[t]he conduct of a secondary actor must satisfy each of the elements . . . for liability,"[372] including reliance.[373] However, while the Court supposedly followed *Central Bank*, in which it had examined the express pri-

371. Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc., 552 U.S. 148, 153–54 (2008).
372. *Stoneridge*, 552 U.S. at 158.
373. *Id.* at 159.

vate causes of action to discern congressional intent, an examination of the express liability provisions does not establish, or even support, the argument that the liability of secondary actors must meet all of the elements of liability for primary actors. The express liability provisions in the 1933 and 1934 Acts are complemented by liability imposed upon controlling persons who, in effect, are secondary actors. Section 15 of the 1933 Act provides:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.[374]

Section 20(a) of the 1933 Act provides:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable . . . unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[375]

In none of these statutory secondary liability provisions is there any indication that, in order to hold the controlling person liable, a plaintiff must prove the same elements of a cause of action against the person secondarily liable as it does against the primary violator. Rather, Congress provided the direct opposite: plaintiff first must prove the cause of action against the primary violator and then the unique elements regarding the secondary violator's responsibility come into play.

3. Contorting Fact to Fit Bias

From a standpoint of common sense, the opinion goes downhill from this point. Let us briefly go back to the facts. The defendants executed documents and engaged in transactions with the issuer, Charter Communications, the sole purpose of which was to inflate Charter's earnings—which was exactly what was accomplished.

With respect to this fraud, the Court made the following statements:

374. 15 U.S.C. § 77o (2012).
375. 15 U.S.C. § 78t(a) (2012).

(i)"[Respondents'] deceptive acts were not communicated to the public";[376]

(ii) "No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts . . . ";[377]

(iii) There is no authority for a rule "that in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect."[378]

(iv) Petitioner seeks to apply § 10(b) beyond the securities markets—"to purchase and supply contracts—the realm of ordinary business operations";[379]

(v) "§ 10(b) . . . does not reach all commercial transactions that are fraudulent and affect the price of a security in some *attenuated* way."[380]

(vi) "Here respondents were acting in concert with Charter in the *ordinary course* as suppliers and, as matters then evolved in the not so ordinary course, as customers";[381]

(vii) "Unconventional as the arrangement was, it took place in the marketplace for goods and services, not in the investment sphere."[382]

(viii)"Charter was free to do as it chose in preparing its books" [i.e. it was not compelled by respondents to cook its books].[383]

The foregoing characterizations make little sense. First of all, the stock market is driven by earnings. Missing an earnings projection by a penny a share can send a stock plummeting.[384] To say that an investor relies on the earnings but not the transactions that underlie such earnings is sophistry. The reported earnings have no relevance absent the integrity of the underlying transactions. In WorldCom, for example, the earnings were fraudulent because cash outflows that should have been expensed were capitalized.[385] That was analogous to the fraud in the case at bar. Investors rely upon earnings as a surrogate for the integrity of the under-

376. *Stoneridge*, 552 U.S. at 159.
377. *Id.*
378. *Id.* at 160.
379. *Id.* at 161.
380. *Id.* at 162 (emphasis added).
381. *Id.* at 166 (emphasis added).
382. *Id.*
383. *Id.*
384. *See, e.g.*, *Oracle Profit, Revenue Miss Expectations; Shares Drop*, CNBC.COM (Dec. 20, 2011, 5:39 PM ET), http://www.cnbc.com/id/45736368 (Oracle reported its quarterly earnings were 54 cents per share, up from 51 cents per share for the previous year, but this was 3 cents per share lower than analysts expected, causing its stock to fall 14.6%).
385. *See* Peter Elstrom, *How to Hide $3.8 Billion in Expenses*, BLOOMBERG BUSINESSWEEK MAG., July 7, 2002, *available at* http://www.businessweek.com/magazine/content/02_27/b3790022.htm.

lying transactions. It is the financial health of the company, and its ability to generate a stream of cash flow in the future, that determines stock price.[386] Thus, as stated above, the reported earnings are a surrogate for the underlying health of the company. When the underlying transactions are fraudulent, the earnings based upon such transactions misinform the market about the underlying health of the company.

Moreover, this fraud did not affect the price of Charter stock *in some attenuated way*. As the Supreme Court expressly stated:

> Charter, a cable operator, engaged in a variety of fraudulent practices so its quarterly reports would meet Wall Street expectations for cable subscriber growth and operating cash flow. . . . Charter executives realized that, despite these efforts, the company would miss projected operating cash flow numbers by $15 to $20 million. To help meet the shortfall, Charter decided to alter its existing arrangements with respondents, Scientific–Atlanta and Motorola.[387]

Rather than affecting the price of Charter stock in some attenuated way, the whole purpose of the fraud was to affect the price of the stock.

Finally, this fraud did not occur in the realm of ordinary business operations, the defendants were not acting in the ordinary course as suppliers, and the transactions did not take place in the marketplace for goods and services. Rather, the fraud was the antithesis of ordinary business operations. In ordinary business operations, buyers do not pay double the market price for goods and advertisers do not buy advertisements they do not want. These transactions were not in the marketplace for goods and services; they were outside the marketplace and involved privately orchestrated corruption.

For the Supreme Court to classify the present fraud as an ordinary commercial transaction is beyond naïve; the Court is consciously straining to present unconscionable activity as merely commercial. It is a little like Humpty-Dumpty in *Through the Looking Glass*: Words mean exactly what I mean them to mean; neither more nor less.[388]

C. Janus Capital*: Who "Makes" a Misrepresentation*

Just when you think Supreme Court jurisprudence cannot become any more detached from reality, the Court proceeds to outdo itself. A

386. Discounted cash flow is a norm for valuing a corporation. Weinberger v. UOP, Inc., 457 A.2d 701, 712 (Del. 1983). The process involves projecting cash flows for a number of years in the future and then taking the present value of such cash flows in order to obtain the present value of the corporation. *See* CHARLES W. MURDOCK, *The Earnings Value of a Business*, *in* 8 ILLINOIS PRACTICE SERIES: BUSINESS ORGANIZATIONS § 19.3 (2d ed. 2013).

387. *Stoneridge*, 552 U.S. at 153.

388. LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 66 (Selwyn H. Goodacre ed., Univ. of Cal. Press 1983) (1871).

straight reading of *Janus Capital Group v. First Derivative Traders*[389] suggests that the Court has eliminated management liability for securities fraud except for those members of management who sit on the board of directors. After *Janus Capital*, the new model for corporate governance could be a board composed only of one inside director, the CEO, and the balance of the board composed of outsiders who, if they are sufficiently uninformed, can escape liability for securities fraud. The rest of management need not worry.[390] And the CEO need not worry if he did not expressly authorize the misrepresentation. Rather than encouraging an informed board, the decision does the converse. Rather than encouraging accountability, it discourages accountability.

1. The Facts

Janus Capital involved a mutual fund, Janus Investment Fund (the Fund), that stated in its prospectuses that it had taken steps to curb market timing,[391] when in fact it had not. Janus Capital Group (Janus Capital) is a publicly traded asset management company that created the Fund as a separate legal entity owned by the Fund's shareholders.[392] Janus Capital Management LLC (Management) is a wholly owned entity controlled by Janus Capital, which was engaged by the Fund to be its investment advisor.[393]

The investment advisory services provided by Management included "management and administrative services necessary for the operation

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389. 131 S. Ct. 2296 (2011).

390. It is too early to predict with assurance how *Janus Capital* will play out. *See infra* text accompanying notes 413–20.

391. *See, e.g.*, Gary D. Halbert, *The Hedge Fund/Mutual Fund Scandal*, PROFUTURES INV., http://www.profutures.com/article.php/206/ (last visited Apr. 22, 2014). Halbert described the market timing scandal as follows:

> Canary [Capital Partners LLC] (and perhaps other large hedge funds) allegedly obtained special trading opportunities with several leading mutual fund families—reportedly including Bank of America's Nations Funds, Banc One, Janus and Strong—by promising to make substantial investments in various mutual funds offered by these firms.
>
> The special trading opportunities, in this case fraudulent trading opportunities, consisted primarily of so-called "late trading" of mutual funds after the stock markets close at 4:00 eastern time. If you or I, for example, want to make a purchase or sale of a mutual fund, we have to get our orders in to the fund family before the close of the markets, sometimes 30 minutes or more before the markets close. If you or I place our order after the markets close at 4:00 today, then we don't get that order filled until tomorrow at the 4:00 closing price.
>
> In the case of Canary, the mutual funds noted above (and possibly others) allegedly allowed Canary (and others) to place its orders AFTER the markets closed and still get the closing price for the same day. As you know, there are frequently announcements just after the markets close that can have significant effects on the markets the following day. Allegedly, these hedge funds would trade on this after-market information and reap big profits the following day.
>
> Allowing large hedge funds to trade after hours is illegal and it serves to reduce profits and/or increase losses to the other shareholders of the mutual funds!

Id.

392. *Janus*, 131 S. Ct. at 2299.

393. *Id.*

of [the Fund]."[394] All the officers of the Fund were officers of Management; one member of the Fund's board of directors was associated with Management.[395]

Plaintiffs alleged that Janus Capital and Management caused the Fund to issue prospectuses that created a misleading impression that Janus Capital and Management would implement measures to curb market timing in the Fund.[396] The district court dismissed the complaint, but the Fourth Circuit reversed on the basis that "JCG [Janus Capital] and JCM [Management], by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents."[397] With respect to reliance, the Fourth Circuit also determined that investors would infer that Management "played a role in preparing or approving the content of the Janus fund prospectuses," but would not infer the same about Janus Capital, "which could be liable only as a 'control person.'"[398]

To this, the Supreme Court simply responded that, to be liable, "JCM [Management] must have 'made' the material misstatements in the prospectuses. We hold that it did not."[399]

2. The Flawed Analysis of the Majority

The policy perspective from which the majority began its analysis is (i) contrary to the philosophy that formerly covered interpretation of the securities laws, namely, "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry," and to construe legislation enacted to avoid fraudulent activity "not technically and restrictively, but flexibly to effectuate its remedial purposes";[400] (ii) contrary to Congressional policy in enacting the 1934 Act "to insure the maintenance of fair and honest markets";[401] and (iii) contrary to the policy of § 10 of that Act to further the public interest and to protect investors.[402] According to the majority, "[c]oncerns with the judicial creation of a private cause of action caution against its expansion," and thus the Court must give "narrow dimensions" to a private cause of action under Rule 10b-5.[403] It should be

394. *Id.* (internal quotation mark omitted).
395. *Id.* The opinion pointed out that the Fund's board was more independent than required by the securities laws: "[U]p to 60 percent of the board of a mutual fund may be composed of 'interested persons.'" *Id.* (citing 15 U.S.C. § 80a-10(a) (2006)).
396. *Id.* at 2300.
397. *Id.* at 2301 (internal quotation marks omitted) (citing *In re* Mut. Funds Inv. Litig., 566 F.3d 111, 121 (4th Cir. 2009), *rev'd*, *Janus*, 131 S. Ct. 2296).
398. *Id.* (internal quotation marks omitted) (citing *In re Mut. Funds Inv. Litig.*, 566 F.3d at 127–30).
399. *Id.*
400. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186, 195 (1963).
401. Securities Exchange Act of 1934, 15 U.S.C. § 78b (2012).
402. 15 U.S.C. § 78i.
403. *Janus*, 131 S. Ct. at 2302 (alteration in original) (internal quotation marks omitted).

noted that the "concerns" about a private cause of action are those of the Supreme Court, not of Congress.[404]

After engaging in some wordsmithing, the majority determined that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[405] According to the Court, "[a] broader reading of 'make' . . . would substantially undermine *Central Bank*" because, "[i]f persons or entities without control over the content of a statement could be considered primary violators who 'made' the statement, then aiders and abettors would be almost nonexistent."[406]

The problem with this statement of the Court is that it is dead wrong, as indicated by the cases it was seeking to preserve and felt compelled to follow and protect. *Central Bank*[407] dealt with an aider and abettor bank that failed to follow up on information that the land, which secured the debentures of which it was a trustee and which was the subject of a forthcoming offering, was substantially overvalued. On the other hand, *Stoneridge*[408] dealt with businesses that conspired with the issuer to manipulate the prices each charged the other in order to inflate the issuer's earnings. In *Central Bank*, there was no assertion that the aiders and abettors *made* any statement. On the other hand, in *Stoneridge*, while the defendants were not charged with directly making a statement, they were charged with knowingly participating in *transactions* which they knew would lead to an earnings statement that misled investors.

In the case at bar, the majority rejected the idea that Management could have "made" the statement in the Fund's prospectus. The Court asserted that only the person with ultimate authority can "make" a statement and that attribution is strong evidence as to who is the maker.[409] In so doing, the majority used the analogy of a speechwriter and a speaker.[410] While the speechwriter may draft a speech, it is the speaker who is responsible for the content.

But in this case, respondent's analogy may be more apt: that of a playwright and the actor.[411] While the actor speaks, it is the playwright who is responsible for the statements.

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404. Courts first recognized a private cause of action in 1946. *See supra* text accompanying note 12. Until *Central Bank*, all eleven circuit courts of appeals had expressly recognized this private cause of action and understood that it included aiding and abetting liability. *See supra* text accompanying note 334. Congress amended the securities laws several times in the interim and never once mentioned any concerns about the application of the private right of action.

405. *Janus*, 131 S. Ct. at 2302.

406. *Id.*

407. *See supra* text accompanying note 324–33.

408. *See supra* text accompanying note 367–69.

409. *Janus*, 131 S. Ct. at 2302.

410. *Id.*

411. *Id.* at 2304.

The majority emphasized that the Fund had an independent board of directors.[412] Thus, the board would be responsible for the misstatements in the prospectuses. But the Fund does not have its own employees.[413] The Fund's board is dependent upon Management for information and advice. As is well known: She who controls the information, controls the decision.[414] But this reality is beyond the ken of the majority. It concludes that, even though Management "was significantly involved in preparing the prospectuses," since Management was "subject to the ultimate control of" the Fund, the Fund, and not Management, made the statements in the prospectuses,[415] even though the board may not have had any knowledge that the statements in the prospectus were false and misleading.

This stance by the majority is even more irrational since the false statements related to a matter—namely, whether market timing had been stopped—which was totally in the control of Management, which drafted the prospectuses. You can rest assured that Management did not tell the board of the Fund that it continued to permit market timing, and that it would also be asserting the contrary in the prospectuses. The Court also relied upon the *Stoneridge* holding that the public could not have relied upon the actions of Motorola and Scientific-Atlanta in conspiring with Charter Communications to inflate the latter's sales, which thus inflated Charter Communications's earnings and stock price, because it was not "inevitable" that the company would use the increased sales to increase its earnings.[416] At the risk of wordsmithing like the majority, it depends upon what the word "inevitable" means. Of course, it is possible that Charter Communications's management might have had a conversion experience, realized the evil of inflating earnings, and reversed the inflated sales data. But is not the likelihood of a conversion experience by management so remote that any rational person would conclude that the pattern of inflated sales would "inevitably" be incorporated into the fi-

412. *Id.*

413. *See supra* Part IV.C.1 ("The Facts") and text accompanying notes 390–98.

414. This conclusion is based upon my experience as an expert in mutual fund litigation. Basically, the board does what the manager recommends. Portions of my opinion were quoted extensively by the Eighth Circuit in reversing the district court in *Gallus v. Ameriprise Financial, Inc.* (the American Express mutual fund advisor). 561 F.3d 816, 819 (8th Cir. 2009), *vacated*, 559 U.S. 1046 (2010). This experience is confirmed by the administrative proceedings in connection with the Janus Group market timing. See Lammert, Exchange Act Release No. ID-348, 2008 WL 6593436 (ALJ Apr. 28, 2008), where the administrative law judge stated:

> The existence of approved market timing relationships was widely known no later than the completion of the Beery Report, which was circulated to dozens of Janus employees and executives. This knowledge was never shared with the Board. In the presentation to the Board on the use of redemption fees on market timing the legal department relied heavily on the Beery Report in the preparation of materials for the presentation. However, the final materials provided to the Board did not include any mention of the approved market timing relationships.

Id.

415. *Janus*, 131 S. Ct. at 2305.

416. *Id.* at 2303 (internal quotation mark omitted).

nancial statements? As indicated above, the thinking process of the majority is either outcome determinative or *Alice in Wonderland.* To suggest that management would orchestrate an elaborate series of fraudulent transactions, but then not "inevitably" incorporate them into the public financial statements, is again irrational.

Yet, the majority uses this twisted logic from *Stoneridge* to support its reasoning in *Janus Capital* that only the person with ultimate control over the statement and its communication can "make" a statement, because "[w]ithout such authority, it is not 'necessary or inevitable' that any falsehood will be contained in the statement."[417] Again, refer back to the prior discussion. It was in the best interest of Janus Capital not to disclose that it had not terminated market timing. Janus Capital, through Management, controlled the drafting of the prospectus. Would any rational person expect Janus Capital to either disclose in the prospectuses that it had continued this illegal activity, or to disclose to the board of directors that it was denying the continuation of this activity in the prospectuses, even though it had not been terminated? The board and thus the Fund were at the mercy of Management. Clearly the statements were "made" by Management. But, since Management did not make the statement, according to the Court, it is not liable, nor is its control person, Janus Capital. And the board of directors is not liable because they lacked scienter as to the misleading nature of the prospectuses.

Once again, the Supreme Court provides a safe harbor for fraudulent activity. Moreover, as discussed below, it has choreographed the perfect crime.

The dissent took the majority to task, not only for the Court's unwarranted reliance upon *Central Bank* and *Stoneridge*,[418] but also, and more importantly, for its unnecessary wordsmithing with regard to the scope of the word "make." The dissent asserted:

> But where can the majority find legal support for the rule that it enunciates? The English language does not impose upon the word "make" boundaries of the kind the majority finds determinative. Every day, hosts of corporate officials make statements with content that more senior officials or the board of directors have "ultimate authority" to control.[419]

Whether this will be the case in the future is discussed below.

3. The Consequences of the Court's Decision

Arguably, the Supreme Court has written the script for the perfect crime. According to the administrative law judge in the disciplinary pro-

417. *Id.*
418. *Id.* at 2307–08 (Breyer, J., dissenting).
419. *Id.* at 2307.

ceedings with respect to market timing by Janus Group, the board of directors was not informed of the market timing activities.[420] If only the board of directors is deemed to make the statement because of its ultimate authority, and if the board is unaware of the truth, then there is no primary violation, which would also mean that, even in an SEC proceeding, there could be no aiding and abetting liability because of the lack of a primary violation.

Under the law prior to *Janus Capital*, as the dissent pointed out:

> [B]oth language and case law indicate that, depending upon the circumstances, a management company, a board of trustees, individual company officers, or others, separately or together, might "make" statements contained in a firm's prospectus—even if a board of directors has ultimate content-related responsibility.[421]

Additionally, the Supreme Court in 1983, in the process of determining that an express private cause of action under the 1933 Act did not exclude an implied cause of action under Rule 10b-5, stated:

> Moreover, certain individuals who play a part in preparing the registration statement generally cannot be reached by a Section 11 action. These include corporate officers other than those specified in 15 U.S.C. § 77k(a), *lawyers not acting as "experts,"* and accountants .... If, as Herman & MacLean argues purchasers in registered offerings were required to rely solely on Section 11, they would have no recourse against such individuals even if the excluded parties engaged in fraudulent conduct while participating in the registration statement. The exempted individuals would be immune from federal liability for fraudulent conduct even though Section 10(b) extends to "any person" who engages in fraud in connection with a purchase or sale of securities.[422]

Thus, it is clear that, in 1983, the Supreme Court envisioned that someone who participated in the drafting of a document could be liable under Rule 10b-5.

The Supreme Court's approach in *Janus Capital* would also seem to make its warning in *Central Bank* that "[a]ny person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under Rule 10b–5,"[423] illusory. Arguably, *Central Bank*, by eliminating aiding and abetting liability, reduced the likelihood that attorneys would act as gate-

420. *See Lammert* opinion cited *supra* note 414. "However, the final materials provided to the Board did not include any mention of the approved market timing relationships." *Id.*

421. *Janus*, 131 S. Ct. at 2306 (Breyer, J., dissenting).

422. Herman & MacLean v. Huddleston, 459 U.S. 375, 386 n.22 (1983) (emphasis added).

423. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994).

keepers in preventing their clients from making fraudulent representations.

In the wake of *Janus Capital*, one circuit court has employed the *Janus Capital* "only the person with ultimate authority can make a statement" test to insulate a corporation called during a conference call from liability for statements made during the call.[424] In *Fulton County Employees Retirement System v. MGIC Investment Corp.*,[425] MGIC owned 46% of the equity of Credit-Based Asset Servicing and Securitization LLC (C-BASS), Radian Group Inc. owned another 46%, and the managers at C-BASS owned the remaining 8%.[426] Thus, C-BASS was essentially a joint venture between MGIC and Radian Group. C-BASS securitized sub-prime mortgages before the financial crisis destroyed its business.[427] As the sub-prime mortgage market began to falter in the summer of 2007, C-BASS's lenders increasingly began making margin calls, creating potential liquidity problems.[428] One of the issues in the case was a conference call held by MGIC on July 19, 2007. According to plaintiffs, Williams, the CEO of C-BASS, and Draghi, its COO, made false or misleading statements.

The Seventh Circuit held that MGIC could not be liable under § 20(a) as a control entity because Radian also had 46% ownership.[429] Consequently, according to the court, MGIC did not have control.[430] With no liability under that section, the plaintiff's other recourse was under § 10(b) and Rule 10b-5. However, because the two officers of C-BASS, Williams and Draghi, made the statements during the C-BASS conference call, MGIC could not be held liable under Rule 10b-5 because, under *Janus Capital*, only the person with ultimate control can be the maker of a statement and MGIC did not have control.[431] Moreover, the Seventh Circuit upheld the district court's analysis rejecting the claims against Williams and Draghi.[432] The district court had opined that, even though much of the remaining money that the managers pointed to when stating that C-BASS had substantial liquidity had already been subject to margin calls before the conference call, this information "may not have made its way up corporate channels" by the time of the call.[433]

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424. *See generally* Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp., 675 F.3d 1047, 1048–52 (7th Cir. 2012).

425. 675 F.3d 1047 (7th Cir. 2012).

426. *Id.* at 1048.

427. *Id.* at 1048–49.

428. *Id.* at 1049.

429. *Id.* at 1051.

430. *Id.* The Seventh Circuit noted that this type of investment structure is very common in joint ventures. *Id.* With § 20(a) liability precluded in all of these types of cases, the impact of *Janus* can be far-reaching.

431. *Id.*

432. *Id.* at 1052.

433. Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp., No. 08-C-0458, 2010 WL 601364, at *17 (E.D. Wis. Feb. 18, 2010), *aff'd*, 675 F.3d 1047 (7th Cir. 2012).

Without personal knowledge of the extent of these margin calls, Williams and Draghi could not have had the requisite scienter to be liable under Rule 10b-5.[434] This fantasy by the district court was possible because, under the Private Securities Litigation Reform Act (PSLRA),[435] plaintiffs must meet a severe pleading burden when met with a motion to dismiss without the benefit of discovery.[436]

Janus Capital may have limited impact with regard to statements made by corporate management, in light of the Supreme Court's own language and the enactment of the Sarbanes–Oxley Act.[437] Justice Thomas accepted that "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed."[438] And, pursuant to section 302 of the Sarbanes–Oxley Act,[439] the CEO and CFO must sign and certify in each annual and quarterly report that they have reviewed the report, that to their knowledge it does not contain any material untrue statement or omission of a material fact, that the financial statement presents fairly the financial condition of the company and the results of its operations, that they are responsible for and have designed such internal controls as necessary to ensure the material information is made known to them, that they have evaluated the effectiveness of such internal controls, and that they have reported any significant deficiencies to the company's auditors and audit committee.[440]

Accordingly, several district courts have recognized that officials who make public statements cannot defend on the basis that they did not have the ultimate authority, but rather that it resided in the board of directors.[441] However, other courts have recognized this defense.[442] In any

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434. *Id.*

435. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. (2012)).

436. *Id.* § 101. It is unfathomable that, with the subprime mortgage market collapsing, and with C-BASS in the first six months of the year having been subject to $290 million of margin calls, that the CEO and COO would not be aware of the fact that another $145 million of margin calls had been made between July 1 and July 19, the date of the conference call. The district court, in effect, indulges in a presumption that management is incompetent to save management from liability.

437. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

438. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011).

439. Sarbanes–Oxley Act of 2002 § 302.

440. *See* 17 C.F.R. § 240.13a-14 (2013); 17 C.F.R. § 229.601 tbl. Instruction (31) (2013).

441. *See In re* Merck & Co., MDL No. 1658 (SRC), 2011 WL 3444199, at *24–25 (D.N.J. Aug. 8, 2011). In *In re Merck*, plaintiffs alleged that Merck overstated the commercial viability of its top-selling drug Vioxx. *Id.* at *1. Several of the individual defendants, all officers of Merck, raised defenses based on *Janus*, arguing that the statements attributed to them cannot lead to liability because the defendants did not have "ultimate authority over the statement[s]." *Id.* at *24 (quoting *Janus*, 131 S. Ct. at 2302) (internal quotation marks omitted). The district court used agency concepts to differentiate, arguing that Management in Janus was a separate entity from the Fund, meaning it was not an agent of the Fund. *Id.* at *25. In *In re Merck*, the officers were agents of Merck. *Id.* Because corporations can only act through agents, it would be unreasonable to absolve corporate officers of primary liability for all 10b-5 claims just because the statements they make are ultimately within control of the corporation that employs them. *See id.*; *see also* Monk v. Johnson & Johnson, No. 10-4841 (FLW), 2011 WL 6339824, at *17 n.19 (D.N.J. Dec. 19, 2011) (defendants raised

event, the confusion caused by *Janus Capital* has added to the cost and inefficiency of litigation by creating another issue that needs to be dealt with by litigants and the courts.

Other courts have suggested that the *Janus Capital* limitation is applicable only to third parties who now cannot be liable for statements made by their clients.[443] Unfortunately, even if *Janus Capital* were so limited, it would undercut the effectiveness of the securities laws in holding gatekeepers accountable. The idea that a lawyer, in drafting documents in connection with a securities transaction, can be held liable as a primary violator for co-authoring or co-creating the document was first developed in *Klein v. Boyd*,[444] a case that was later settled on appeal and the opinion withdrawn. This was further developed in *In re Enron Corp. Securities, Derivative, and ERISA Litigation*.[445]

Consider the massive fraud perpetrated at the turn-of-the-century by Enron, assisted by its attorneys. In litigation arising out of Enron's massive fraud, plaintiffs sued two law firms, Vinson & Elkins and Kirkland

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claims almost identical to those in *In re Merck*, and the district court used the same analysis from *In re Merck* to refute them); SEC v. Brown, 878 F. Supp. 2d 109, 116 (D.D.C. 2012).

442. In *Hawaii Ironworkers Annuity Trust Fund v. Cole*, No. 3:10CV371, 2011 WL 3862206 (N.D. Ohio Sept. 1, 2011), the court stated that there was nothing in *Janus* that would limit its holding "to legally separate entities." *Id.* at *3. The court concluded that "[t]he complaint does not state a claim for primary liability under *Janus*, because the defendants[, former officers of the company,] did not have ultimate authority over the content of the statement." *Id.* at *5.

443. City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp., 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012).

> As for *Janus Capital*, that case addressed only whether *third parties* can be held liable for statements made by their clients. Its logic rested on the distinction between secondary liability and primary liability and has no bearing on how corporate officers who work together in the same entity can be held jointly responsible on a theory of primary liability. It is not inconsistent with *Janus Capital* to presume that multiple people in a single corporation have the joint authority to "make" an SEC filing, such that a misstatement has more than one "maker."

Id. (citations omitted).

444. 949 F. Supp. 280, 284 (E.D. Pa. 1996), *aff'd*, Nos. 97-1143, 97-1261 (3d Cir. Mar. 9, 1998), 1998 WL 55245, *reh'g en banc granted, vacated.*

445. *In re* Enron Corp. Sec., 235 F. Supp. 2d 549, 586 (S.D. Tex. 2002). *In re Enron Corp.* summarized *Klein* as follows:

> [I]n *Klein v. Boyd*, a panel of the Third Circuit Court of Appeals [found that the law firm in the dispute could be liable as a primary violator of securities fraud even though the attorney did not sign the documents and was never known to the investor as a participant in the documents' creation. The appellate court concluded] that once the law firm "elected to speak" by creating or participating in the creation of [the] documents . . . it could not make material misrepresentations or omit material facts in drafting the non-confidential documents[, such as opinion letters]. The law firm's duty did "not arise from a fiduciary duty to the investors; rather, the duty arose when the law firm undertook the affirmative act of communicating with investors . . . ." Thus the Third Circuit panel concluded that although the firm may not have a duty to blow the whistle on its client, once it chooses to speak, a law firm does have a duty to speak truthfully, to make accurate or correct material statements, [even though the document may not be facially attributed to the lawyer]. The panel did require that the lawyer's "participation in the statement containing a misrepresentation or omission of a material fact [be] sufficiently significant that the statement can properly be attributed to the person as its author or co-author," so that it would not fall within the parameter of conduct constituting aiding and abetting.

Id. at 602 (last alteration in original) (citations omitted).

& Ellis, in connection with their participation with the fraud.[446] Vinson & Elkins was the *general* counsel for Enron and not only represented it in structuring illicit partnerships and special purpose entities for the purpose of inflating Enron's earnings, but also drafted numerous disclosure documents, including registration statements and SEC filings,[447] which incorporated misrepresentations about the nature and purpose of these entities and their effect upon Enron's earnings. According to the court, the law firm effected the "deceptive devices and contrivances that were the heart of the alleged Ponzi scheme."[448] Vinson & Elkins' "voluntary, essential, material, and deep involvement"[449] made it a primary violator in Enron's fraudulent scheme. Moreover, "Vinson & Elkins was not merely a drafter, but essentially a co-author of the documents it created for public consumption concealing its own and other participants' actions."[450] The court determined that the law firm "deliberately or with severe recklessness" put these misrepresentations in the public domain in order to "influence those investors to purchase more securities, credit agencies to keep Enron's credit high, and banks to continue providing loans to keep the Ponzi scheme afloat. Therefore Vinson & Elkins had a duty to be accurate and truthful."[451]

According to the court, this was not a situation where Vinson & Elkins "merely" violated its professional principles and ethics. On the other hand, the court determined that this was the case for Kirkland & Ellis since, while "Kirkland & Ellis represented some of the illicit Enron-controlled, non-public SPEs and partnerships that Enron . . . used . . . to

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446. *Id.* at 563–64.

447. *See, e.g., id.* at 660–61.

Disclosures in the following SEC filings, drafted and approved by Vinson & Elkins, concealed material facts about the JEDI/Chewco, LJM, and/or Raptor transactions:

A. Quarterly Reports (on Form 10-Q) filed on: 8/16/99; 11/15/99; 5/15/00; 8/14/00; 11/14/00; 5/15/01; and 8/14/01.

B. Annual Reports (on Form 10–K) filed on 3/31/98; 3/31/99; 3/30/00; and 4/02/01.

C. Annual Proxies filed on: 3/30/99; 5/02/00; 5/01/01.

D. Report on Form 8–K, filed 2/28/01.

Furthermore, Enron related-party disclosures from Enron's previous Report on Form 10–K and Report on Form 10–Q were incorporated by reference into the following Registration Statements and Prospectuses for Enron securities offerings: the resale of zero coupon convertible senior notes, due 2021, filed 7/25/01; 7.875% notes due 6/15/03, filed 6/2/00; 8.375% notes due 5/23/05, filed 5/19/00; 7% exchangeable notes due 7/31/02, filed 8/11/99; 7.375% notes due 5/15/2019, filed 5/20/99; common stock, filed 2/12/99; 6.95% notes due 7/15/2028, filed 11/30/98; and floating notes due 3/30/00, filed 9/28/98. The disclosures consistently misrepresented that terms of Enron's transactions with related third parties were representative of terms that could have been obtained from independent third parties. Both Sherron Watkins' letter and the Powers' Report concluded that the transactions were not arm's length, lacked true economic import, and were such that no independent third party would have accepted.

Id.

448. *Id.* at 704.

449. *Id.* at 705.

450. *Id.*

451. *Id.*

hide its debt and record sham profits,"[452] it never made any misstatements or misrepresentations to the public. While it also breached professional ethical standards, its conduct was not actionable under Rule 10b-5.

The difference in approach between the Texas District Court and the U.S. Supreme Court is striking. The conduct of the investment advisor in *Janus Capital* was even more pervasive than the conduct of Vinson & Elkins. The investment advisor had complete practical control over the misrepresentations and hid their true nature from the directors of the mutual fund. The district court's focus was, appropriately, on the existence of wrongdoing and whether this wrongdoing was directed to the investing public. The fact that the client had "the final authority to control the contents of the registration statement"[453] was irrelevant in view of the deep involvement of the law firm in the preparation of the registration statement and the law firm's knowledge of the true state of affairs. The focus of the Supreme Court was on a hypertechnical definition of "make," which it utilized to ensure that wrongdoing would go unpunished. The effect of the district court's decision was to send a sober warning to gatekeepers that they are not hired guns, but have a responsibility to the public. The effect of the Supreme Court decision is to create a "what, me worry" attitude in attorneys and other gatekeepers.

Cases such as the foregoing, which required that a lawyer be a counselor and not just a hired gun, are now eviscerated by the Supreme Court's decision in *Janus Capital.*

CONCLUSION

The evolution of Supreme Court jurisprudence over the past forty years reflects a sea of change in judicial philosophy. At the start of the 1970s, the liberal trend characterized by the Warren Court still prevailed. An implied private cause of action was still in favor and litigators were viewed as private attorneys general,[454] enforcing the securities laws to further the policy of protecting investors. Arguably, judicial overexuberance led to some loose reasoning in cases such as *Superintendent of Insurance* and *Affiliated Ute.*

The expansion of Rule 10b-5 was slowed and more judicial discipline was injected by the Burger Court in the mid-1970s. A trilogy of well-reasoned conservative decisions put Rule 10b-5 jurisprudence in a proper perspective: plaintiffs needed to be buyers or sellers to have standing, scienter was required to distinguish the implied cause of action

452. *Id.* at 705–06.

453. *Id.* at 704 (internal quotation mark omitted).

454. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) ("Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in anti-trust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements.").

from the express remedies in the securities acts, and deception was the touchstone for an action predicated upon a statute giving the SEC the authority to prohibit only manipulative or deception conduct.

In the 1980s the Rehnquist Court began a naïve and reactionary trend—ignoring fraudulent conduct in order to further circumscribe the reach of Rule 10b-5. Although the securities laws were enacted because the common law was inadequate, the Court in *Chiarella* introduced the common law concept of fiduciary duty to curtail the application of the securities laws, while citing authority that took a diametrically opposed interpretation. This was the beginning of an outcome-determinative analysis that was expanded in *Dirks* to add a naïve quality when the Court ignored the SEC's warning that some excuse could always be fabricated[455] to evade the test for liability formulated by the *Dirks* majority.

The final trilogy began with the Rehnquist Court and ended with the Roberts Court. Conservative jurisprudence has now been abandoned, and the Court used one ill-reasoned decision to awkwardly justify an even more ill-reasoned decision. *Central Bank* was the epitome of judicial activism. The Court instructed the parties to brief an issue that had not been considered in the courts below nor raised by the parties on appeal; the Court rejected the unanimous position of all the judicial circuit courts that aiding and abetting liability did attach to a primary violation under Rule 10b-5; the Court ignored statutory language and legislative history that dictated a contrary result; and the Court relied upon the lack of aiding and abetting provisions with respect to express private causes of action sounding in negligence to justify the elimination of aiding and abetting liability under Rule 10b-5, which requires scienter—ignoring the fact that aiding and abetting liability traditionally had not been applicable with respect to negligence actions.

In the *Stoneridge* and *Janus Capital* cases, the Court then strained to contort these cases as being controlled by *Central Bank*, even though they involved direct participation in the fraud, rather than aiding and abetting liability. It then articulated an absurd interpretation of the word "make" in *Janus Capital* to exculpate the person who not only drafted the document but also controlled the "facts" in the document that made it misleading.

Since the 1980s, the fact is inescapable that the Supreme Court, confronting activity that it acknowledged as fraudulent,[456] has engaged in

455. *See* Dirks v. SEC, 463 U.S. 646, 663 (1983) ("The SEC argues that, if inside-trading liability does not exist when the information is transmitted for a proper purpose but is used for trading, it would be a rare situation when the parties could not fabricate some ostensibly legitimate business justification for transmitting the information. We think the SEC is unduly concerned.").

456. Arguably, this is not true of the defendant in *Dirks*: the majority saw him as a hero even though he personally profited by enabling his clients to dump stock and depress the market, to the detriment of uninformed public investors. *Id.* at 665–67.

tortuous, outcome-determinative reasoning to create, in effect, safe harbors for fraudulent activity. In so doing, the Court reflects not a conservative philosophy, but a reactionary one. Its advocacy for conduct that in some instances could be criminal stands in stark contrast to the Warren Court. The Warren Court sought to protect the uninformed from the power of the State; the Roberts Court appears to protect the powerful from the uninformed investing public.

While correlation is not causation, it is noteworthy that a rash of insider trading followed the insider trading trilogy, and that the corporate corruption scandals[457] of the 2000s followed *Central Bank* and PSLRA.[458] The impact of the insider trading cases has been dampened by the enactment of the Insider Trading Sanctions Act and the Insider Trading Securities Fraud Enforcement Act,[459] and the reluctant acceptance of the misappropriation theory by the Supreme Court in *O'Hagan*.[460] On the other hand, the Court's ill-advised emasculation of liability for collateral participants needs to be reversed legislatively. Congress went part way when it reinstated aiding and abetting liability in actions brought by the SEC. It now needs to complete this effort by extending aiding and abetting liability to private litigation. By reversing *Central Bank*, it will also take down *Stoneridge* and *Janus Capital*, and close the judicially created loopholes that have enabled corrupt actors to act with impunity and avoid accountability.

457. *See* HAROLD S. BLOOMENTHAL, SARBANES–OXLEY ACT IN PERSPECTIVE app. D at 869–70 (2006–2007 ed. 2006) (listing over twenty of the more spectacular examples of corporate corruption during this period).

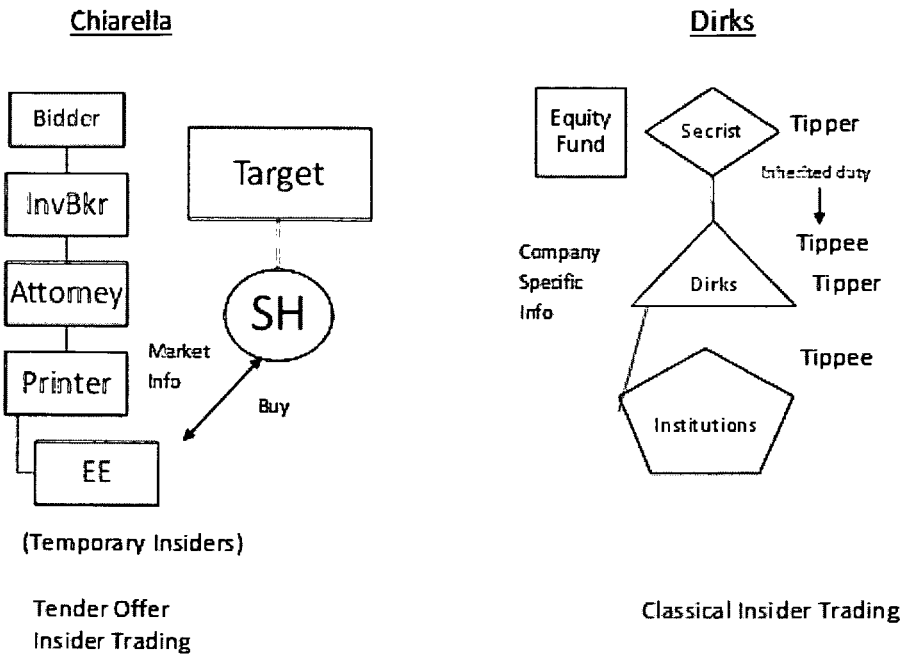
458. *See, e.g.*, 15 U.S.C. § 78u-5(c)(1) (2012) (the effect of this provision is to exculpate a person who, with knowledge, makes a fraudulent forward-looking statement, if the statement is accompanied with cautionary language).

459. *See supra* text accompanying notes 295–96 (discussing the impact of these legislative enactments).

460. Chief Justice Rehnquist and Justices Scalia and Thomas dissented from the Court's acceptance of the misappropriation theory. United States v. O'Hagan, 521 U.S. 642, 646, 650 (1997).

EXHIBIT A

Insider Trading Models



WHAT'S MONEY GOT TO DO WITH IT?:

PUBLIC INTEREST LAWYERING AND PROFIT

KATHRYN A. SABBETH†

ABSTRACT

Definitions of "public interest lawyering" influence financial support, regulation of lawyers, and professional identity. This Article examines three contexts in which legal institutions have operationalized the concept of public interest lawyering: tax exemptions, exceptions to solicitation prohibitions, and fee-shifting statutes. The Article critiques the common conception of public interest lawyering as work provided by non-profit organizations or through volunteer activities outside the mainstream market for legal services. It argues that interpreting public interest lawyering as a market exception not only is incomplete but also threatens the viability of important work.

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Public interest lawyers are too busy acting in behalf of the public interest to worry a great deal about how it is defined.

—Stuart A. Scheingold[1]

INTRODUCTION

Public interest lawyering[2] is a term we all know and an activity we all support in principle.[3] Yet, upon inspection, its definition remains obscure.[4] A common conception is that public interest lawyering is distinct from commercial, profit-generating practice.[5] The profession identifies public interest lawyering as work with discounted value in the regular market for legal services.[6] For the past few decades, the phrase "*pro bono publico*" has been used to signify services provided for free or at a reduced rate.[7] From pro bono requirements[8] to public interest loan assis-

1. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 185 (Univ. of Mich. Press 2d ed. 2004) (1974).

2. This Article will use the terms "public interest lawyering," "public service lawyering," and "pro bono lawyering" interchangeably.

3. For a description and critique of the broad support for professionals engaged in public interest lawyering, see Dennis G. Jacobs, Chief Judge, U.S. Court of Appeals for the Second Circuit, Remarks Before the Rochester Lawyers Chapter of the Federalist Society: Pro Bono for Fun and Profit 4 (Oct. 6, 2008) (transcript available at http://www.fedsoc.org/publications/pubid.1178/pub_detail.asp).

4. *See* David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 210 n.1 (2003) ("By 'public-interest law,' I do not mean 'law practiced on behalf of the public interest.' That usage would make the phrase completely tendentious, because people disagree fundamentally over what the public interest is.").

5. *See* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2106–10 (2004) (describing how the legal profession constructs the dichotomy between public interest lawyering and financial earnings).

6. The Model Rules of Professional Conduct describe "*pro bono publico*" as "a professional responsibility to provide . . . services to those unable to pay." MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012). The services are to be provided "without fee or expectation of fee," or at a "substantially reduced fee." R. 6.1(a), (b). A statutorily-awarded fee for pro bono activity should be donated, at least in part. R. 6.1(a) cmt. 4.

7. *See* Erichson, *supra* note 5, at 2108–09 (highlighting that "pro bono publico" has come to mean "lawyering for no fee" rather than lawyering "for the public good).

8. *See, e.g.*, *In the Public Interest: Pro Bono Requirement*, TUL. U. L. SCH., http://www.law.tulane.edu/PublicInterest/index.aspx?id=12020 (last visited Feb. 12, 2014) (defining "pro bono work" as services "on behalf of indigent persons or with non-profit, public interest organizations that serve the community"); *Public Service: JD Requirement*, U. PA. L. SCH., https://www.law.upenn.edu/publicservice/pro-bono/jd-requirement.php (last visited Feb. 12, 2014)

tance programs,[9] institutions have relied on non-profit status or the absence of fees as a key indicator of lawyering for the public good. A handful of scholars have pointed to private, for-profit firms whose work complicates the picture,[10] but leaders of the profession continue to perceive a dichotomy between public interest lawyering and profit, and they continue to perpetuate that perspective.[11] This Article builds on previous scholars' research to question whether profit should play a role in assessing the public value of lawyers' work. Further, this Article suggests that interpreting public interest lawyering as a market exception not only is incomplete, but, moreover, it threatens the viability of important categories of work.

It must be recognized at the outset that the common conception of public interest lawyering as free or low-cost legal services is not the product of an historical accident; it reflects an intentional emphasis on access to representation.[12] The access perspective starts from the premise that a core public obligation of the legal profession is to provide equal access to the legal system without regard for any client's status or viewpoint.[13] Many have interpreted public interest lawyering to mean increas-

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(defining "pro bono" as "uncompensated, voluntary work that yields a public benefit," including work "with community, government, or non-profit organizations" or individuals "unable to pay for legal services"); *Pro Bono*, VINSON & ELKINS, http://www.velaw.com/overview/ProBono.aspx (last visited Feb. 12, 2014) (defining pro bono work as "free legal service . . . to those in need"); *Pro Bono News: NY Firm Adopts Internal Mandatory Pro Bono Policy*, LEGAL SERVS. NOW (ABA Div. for Bar Servs. & Div. for Legal Servs.), Jan. 7, 2005, at 1, *available at* http://www.americanbar.org/content/dam/aba/publishing/legal_services_now/legalservices_sclaid_lsn_docs_LSN200501.authcheckdam.pdf (announcing firm's mandatory pro bono policy requiring free services to indigent clients).

9. *See* HEATHER WELLS JARVIS, EQUAL JUSTICE WORKS, FINANCING THE FUTURE: RESPONSES TO THE RISING DEBT OF LAW STUDENTS 12, 21 (Cindy Adcock et al. eds., 2d ed. 2006), *available at* http://www.equaljusticeworks.org/sites/default/files/financing-the-future2006.pdf; Philip G. Schrag & Charles W. Pruett, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583, 587–90 (2011).

10. *See, e.g.*, ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 169–200 (2013); Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 183 (Robert Granfield & Lynn Mather eds., 2009); Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201, 201 (Austin Sarat & Stuart Scheingold eds., 1998).

11. *See infra* Parts I and II.

12. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 3 (1989) ("Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, public interest law rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace."); Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1448–50 (1984) (describing "access for unrepresented issues to the judicial system" as the rationale for and definition of public interest practice); Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417, 421–22 (2011) (describing the Ford Foundation's use of "'market failure' economic literature" to justify the development of non-profit, public interest law firms).

13. *See* Erichson, *supra* note 5, at 2119, 2119 n.140; *see also* John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 362–63 (2004) (articulating an access-based vision of public interest law).

ing access to the legal system for those persons or interests that are "underrepresented" in the regular market for services.[14] Persons may be underrepresented because they cannot afford to pay market rates for representation, or interests may be underrepresented because, though important for the public at large, they are not attached to economic incentives sufficient to attract private litigants. Providing free or low-cost services to these underrepresented persons and interests corrects for failures of the market.

The access perspective embodies an important equality aspiration and should not be abandoned, but, without more, the emphasis on access to services results in an incomplete definition of public interest lawyering.[15] All lawyers serve the interests of some portion of the public,[16] but few would suggest that all lawyering is public interest lawyering.[17] Under the access perspective, the absence of market incentives or sufficient subsidies creates a scarcity of lawyers for certain persons and interests, and the provision of free or low-cost services to fill that gap is therefore a public service, like an act of charity.[18] While market undervaluation could be one part of the equation, recommending subsidies wherever there is a shortage of funding,[19] market undervaluation does not tell us which work is substantively worth funding, beyond the notion that all lawyering has social value and should be distributed evenly.[20] Notably, the emphasis on access suggests that all lawyering is equally valuable and that even distribution of legal services promotes social equality (or some other, more important, social goal).

Beyond the view that serving any subset of the public is a public service, however, there remains a question as to which categories of lawyering should be specially recognized as public interest lawyering.[21]

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14. Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 1–2 (2012) (internal quotation mark omitted); Luban, *supra* note 4, at 210 n.1.

15. *See* David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 342–43 (1996).

16. Conservative lawyers see themselves as protecting important public interests. For example, the lawyer opposing an environmental group might believe she is the protector of jobs for loggers, just as the anti-New Deal lawyers believed they were fighting oppressive governmental overreach. *See* Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1251–52 (2005).

17. *See* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3 (1970).

18. *See* Houck, *supra* note 12, at 1419–20, 1448 (describing the development of public interest law organizations as "public charities" that improve "access" for "underrepresented" and "underfinanced interests").

19. *See* Erichson, *supra* note 5, at 2110 (suggesting that defining public interest lawyering in terms of low pay or market underrepresentation is appropriate for subsidies).

20. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (1986) (proposing that as long as the lawyer does not facilitate unlawful conduct, "what the lawyer does is a social good," even if it may not be morally good); *cf.* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 644 (1986).

21. Austin Sarat and Stuart Scheingold prefer the term "cause lawyering." *See* STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3–7 (2004). They argue that the term "public interest" begs the question of

Which lawyering has a special social value? This question raises controversy, particularly in a democratic society with a constitutional framework that purposefully embraces government neutrality and avoids defining a substantive conception of public good.[22]

Nonetheless, institutions do construct definitions of public interest lawyering on a regular basis, and should do so on the basis of candid and thorough deliberations. The definitional question tackled in this Article is not purely academic; it carries implications for professional identity, regulation, and financial support. With respect to the identity of the profession, it pushes us to consider what kind of professional work is in the public interest and what is expected from the profession as a whole.[23] With respect to regulation of the profession, this inquiry could inform whether to hold public interest lawyers to higher standards and when, if ever, to exempt them from professional requirements that hamper their work.[24] Lastly, the definition carries implications regarding financial support,[25] including grants from governmental or private sources, loan repayment or forgiveness by law schools or lenders, summer stipends for students, and entire years of salaries paid by corporate law firms that defer their incoming classes and encourage recent recruits to pursue work in the public interest.[26] Grappling with the definition of public interest lawyering means considering which behavior the profession should encourage when it confers reputational advantages and formal awards, and which behavior it should require when it adopts pro bono mandates.[27]

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defining the public and what is in the public's interest, and leaves unexamined the tension between serving private clients and serving the public good. *Id.* at 5–6. Cause lawyering is clear about its chief priority: commitment to social, political, or economic principles, such that serving the client is but one component of serving the cause. Cause lawyering literature has made an enormous contribution in shifting moral and political commitments from the margins to the core of legal ethics, and it has been radical in suggesting that service to a client could be secondary to another purpose. Moreover, it has been thoughtful in focusing on attorneys' motivations, rather than any pecuniary indicator, to distinguish cause lawyering. Yet the inclusiveness of this framework is also its weakness: it fails to indicate which kinds of lawyering activities are in the public interest, beyond recognizing those activities the lawyers performing them say should be so recognized. *See* Luban, *supra* note 4, at 210 n.1 (defining public interest lawyers with two limiting criteria, one based on lawyers' motives and the other based on representing the underrepresented, with the latter criterion excluding "self-styled" public interest lawyers who represent well-funded corporate interests). This Article suggests that legal institutions need to make substantive determinations as to which work deserves special support, based on priorities defined by those institutions.

22. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 25–54, 71–79 (1996).

23. *See infra* Part I (describing implications for professional identity); *see also* Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at SR10.

24. *See infra* Part II.B (describing exception to solicitation prohibition).

25. *See, e.g.*, *infra* Part II.A (describing tax benefits), II.C (describing fee-shifting provisions).

26. PRO BONO INST., LAW FIRM DEFERRED ASSOCIATES AND PUBLIC INTEREST PLACEMENTS: SURVEY REPORT AND PRELIMINARY ASSESSMENT 4 (2010), *available at* http://www.probonoinst.org/wpps/wp-content/uploads/deferred_associates_survey_2010.pdf; COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 217–338 (1976) (describing funding sources for public interest law).

27. States have begun experimenting with pro bono requirements. New York is the first to adopt one. 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013).

This Article calls for renewed efforts to fashion positive visions of public interest lawyering defined by more than the absence of resources. A central question is whether public interest lawyering means any representation that increases access to legal services or, instead, law practice that promotes particular substantive values. This Article argues that the former approach is incomplete. Rather than use profit status, fee restrictions, or client indigency as a litmus test of public value, we should come to terms with what our public values are. To be clear, this Article does not suggest that there can or should be one universal definition of public interest lawyering, but that public interest lawyering does have substantive, "institutionally specific"[28] meanings, and legal actors must take responsibility for how they apply the term. This will require making conscious choices about priorities and not shying away from the normative and practical implications of those choices.[29]

The Article proceeds as follows. Part I situates public interest lawyering within the identity of the legal profession as a whole. Part II describes three contexts in which legal institutions operationalize public interest lawyering: (a) tax benefits for public interest lawyering; (b) a public interest exception to the legal profession's prohibition of solicitation of employment; and (c) fee-shifting statutes that provide special funding for public interest lawyering. Part III draws comparisons between the three contexts and analyzes what they reveal about the larger definitional project. Fee-shifting statutes stand in contrast to the other two settings. In fee-shifting statutes, elected officials have recognized substantive definitions of public interest lawyering, acknowledged that successful public interest practice requires financial support, and created a mechanism to facilitate public interest lawyering for profit. Part IV challenges the definition of public interest lawyering in opposition to profit. It highlights empirical research that reveals alternative models of public interest practice. Part IV suggests that there are inherent benefits of supporting fee-based and for-profit forms of public interest work. Further, economic strength and economic power are necessary to engage in certain categories of public interest work. Fee-shifting statutes could offer one realistic source of that strength and power, but judges' percep-

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28. As Alan Chen and Scott Cummings explain in their new book:

> [T]he use of "public interest law" as a label for a distinctive form of lawyering . . . retains its power not because there is an Archimedean point by which we may judge the public interest across the divisions of politics and culture, but rather precisely because it claims a higher political ground, asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms.

CHEN & CUMMINGS, *supra* note 10, at 7.

29. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2128 (2000) (suggesting, in the context of judges' fee decisions, that reliance on market measures of the value of lawyers' work is a method of attempting to avoid making substantive value assessments); *see also* Sandel, *supra* note 22 (arguing for articulation of substantive public good).

tions of public interest lawyering as charity currently threaten the effectiveness of these statutes. Ultimately, the view of public interest lawyering as services provided exclusively by non-profit organizations or volunteer activities, outside the market for services, threatens the viability of lawyering in the public interest.

I. A PUBLIC PROFESSION, WITH SOME AMBIVALENCE

Mainstream discourse treats public interest lawyering as an exception to the practice of law. This begins in law schools, before lawyers have even entered practice, when their professional identities are still nascent. It can be seen in how many law schools maintain separate "Career Services" and "Public Interest" offices.[30] It can be seen in how well-meaning faculty and administrators encourage students to pursue pro bono projects as an extracurricular activity, conveying the impression that "pro bono" means a volunteer activity on the side.[31] Law graduates regularly take this conception of pro bono with them into the profession.[32] They develop an impression of their profession distinct from public interest lawyering, which they view as an act of charity for when they have the time and inclination.

Some scholars have argued that constructing the notion of public interest lawyering as an exceptional form of practice can harm the image of the profession.[33] Sarat and Scheingold have suggested that, during periods of public criticism of or suspicion about the profession, the American Bar Association has made special efforts to embrace and highlight the public interest work of its members, and it has done so with success.[34] Including public interest activities within the scope of lawyering, and

30. *See, e.g.*, *Careers*, HARV. L. SCH., http://www.law.harvard.edu/current/careers/index.html (last visited Feb. 17, 2014) (Office of Public Interest Advising separate from Office of Career Services); *Office of Public Interest and Community Service*, GEO. L., http://www.law.georgetown.edu/careers/opics/index.cfm (last visited Feb. 17, 2014) (Office of Public Interest and Community Services separate from Office of Career Services); *cf. Public Interest Career Services*, YALE L. SCH., http://www.law.yale.edu/academics/publicinterestcareerservices.htm (last visited Feb. 17, 2014) (specialized counseling for public interest careers available within Career Development Office).

31. *See, e.g.*, Standing Comm. on Pro Bono & Pub. Serv. & the Ctr. for Pro Bono, *Chart of Law School Pro Bono Programs*, A.B.A., http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html (last updated Sept. 23, 2013) (summarizing law schools' extracurricular pro bono programs); *see also* Standing Comm. on Pro Bono & Pub. Serv. & the Ctr. for Pro Bono, *Law School Pro Bono Programs – Awards and Recognition*, A.B.A., http://apps.americanbar.org/legalservices/probono/lawschools/pb_awards.html (last updated Feb. 14, 2014) (describing law schools' awards for pro bono activity).

32. *See* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 257 (1990). *See generally* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73–81 (1980) (discussing the moral detachment of lawyers).

33. *See* SCHEINGOLD & SARAT, *supra* note 21, at 24–25.

34. *See id.* In an earlier time, Justice Brandeis put this idea in starker terms when he warned that there would be "a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression." LOUIS D. BRANDEIS, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION 329, 339 (Hale, Cushman & Flint 1933) (1914).

taking ownership of such activities as a central part of the profession, might create a more likeable, less amoral portrait of lawyers, and generate increased respect for the rule of law.[35]

Another reason for concern about the split between doing good and "conventional"[36] practice is that, if lawyers see public interest lawyering as marginal, such lawyers may lose sight of their moral agency. Once they have set off, by choice or by need, in a conventional legal career, they may believe they have left behind public interest concerns and bear no professional obligation to consider the public interest while fulfilling their daily responsibilities. Robert Gordon describes students who, after abandoning ambitions of public interest careers, make the switch to pursue corporate law and "go all the way."[37] They see themselves as driven solely by interests of clients, and are shy to consider, let alone express, any ethical misgivings about client choices or directions from superiors.[38]

To be sure, thoughtful scholars can disagree about where lines ought to be drawn in the roles of counseling or advocating for a client. David Luban has emphasized the lawyer's obligation to guide clients' activities, insert oneself in decision-making, and steer clients towards conformance with the public interest.[39] William Simon argues that lawyers should maintain discretion to decline to pursue procedural or substantive arguments despite clients' instructions to pursue them and despite the possibility of legal merit.[40] Monroe Freedman and Abbe Smith, on the other hand, make compelling arguments that once a lawyer has signed up to represent a client, it is improper to hold back any tools at her disposal.[41] The lawyer serves the public interest as a zealous advocate, and any dereliction of that duty is the greatest failure.[42] Yet Freedman and Smith still make ethical distinctions between available legal options. They suggest an ethical decision must be made at the moment of entering into a retainer.[43] Rather than accepting that a lawyer should represent

35. *Id.*

36. This Article uses Sarat and Scheingold's definition of the term "conventional lawyering." *See* SCHEINGOLD & SARAT, *supra* note 21, at 1–22. Conventional lawyering "involves the deployment of a set of technical skills on behalf of ends determined by the client, not the lawyer." *Id.* at 2. In contrast to cause lawyering, conventional lawyering "is neither a domain for moral or political advocacy nor a place to express the lawyer's beliefs about the way society should be organized, disputes resolved, and values expressed." *Id.*

37. Gordon, *supra* note 32, at 291–92.

38. *Id.*

39. *See* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 1 (2007); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50–103, 174 (1988).

40. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113–19 (1988).

41. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 79–80, 86–87, 121–25 (2d ed. 2002).

42. *Id.* at 8, 13–14, 19–31, 45–49.

43. *Id.* at 59, 8–84; Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112–13 (1995).

anyone who comes to her door, they recognize the choice of whom to represent as an important question.[44]

Regardless of their differences regarding how or when in the representation process it occurs, all of these scholars acknowledge some point at which the individual lawyer's ethics could restrict her advocacy. In contrast, if Gordon is right that some law graduates believe their new professional identity means setting aside their ethical instincts, as lawyers, these persons might become wholly unmoored from any sense of public obligation. That possibility threatens the image and, potentially, the legitimacy of the legal profession.[45]

Historically, working for the public interest has not been an afterthought, left to positions on the margins. On the contrary, serving the public interest has been described as a founding principle of the profession.[46] Talcott Parsons and sociologists following him have highlighted the important social functions served by the legal profession.[47] Roscoe Pound famously stated that a profession is geared towards public service by definition:

> The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. *Pursuit of the learned art in the spirit of a public service is the primary purpose.* Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.[48]

From this perspective, the pursuit of public service is the marker that distinguishes a profession from a trade.[49]

Notably, Pound's depiction of the professions indicates not only that service is central, but also that "[g]aining a livelihood is incidental."[50] With regard to the legal profession in particular, this is a his-

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44. *Id.*

45. *See* Postema, *supra* note 32, at 73–81.

46. *See, e.g.*, BRANDEIS, *supra* note 34, at 330.

47. TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370, 381–85 (rev. ed. 1954) (arguing that lawyers provide a critical function in society). For critiques of the functionalist view, see MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 167–69 (1977) (discussing lawyers' interest in maintaining economic power). For a critique of both Parsons's approach and "anti-Parsonian" approaches, see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983).

48. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) (emphasis added).

49. *Id.*; *see* John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 813 (2005) (summarizing sociological debates on the significance of professions); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 592 (1985) (collecting examples of heightened rhetoric surrounding images of lawyers as professionals and not businesspersons).

50. POUND, *supra* note 48, at 5.

torically accurate representation of an earlier age. When the profession first developed in England, pecuniary gain was neither a goal nor a reality of the practice.[51] Between the seventeenth and nineteenth centuries, barristers were not permitted to charge fees and accepted payments only as honoraria.[52] According to Henry Drinker, barristers "regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident."[53] Barristers came from wealthy families and did not depend on their legal work to generate income.[54] These men occupied a privileged position that afforded them the luxury to pursue the public interest without regard for financial support.[55]

Today, however, the American Bar Association boasts roughly one and one quarter million members,[56] and it would be a rare member who could perform this role as an unpaid volunteer.[57] While some attorneys possess public service aspirations, most need and expect financial compensation for their work.[58] This is relatively uncontroversial, and the current ideals of the profession do not conflict with the desire to earn a living.[59] On the contrary, a handsome salary is commonly viewed as an

51. HENRY S. DRINKER, LEGAL ETHICS 210 (1953); *see also* Alexander Schwab, Note, *In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3*, 29 YALE L. & POL'Y REV. 603, 606 (2011) (explaining that it was considered ungentlemanly for English barristers to be motivated by financial gain).

52. Kelly Buechler, Note, *Solicitation in Class Actions: Should Class Certification Be Denied Because Class Counsel Solicited the Class Representative?*, 19 REV. LITIG. 649, 662 (2000); Katherine A. Laroe, Comment, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513, 1520 (1994).

53. DRINKER, *supra* note 51, at 210–11; *see* Buechler, *supra* note 52, at 662; Laroe, *supra* note 52, at 1520.

54. DRINKER, *supra* note 51, at 210; *see also* Buechler, *supra* note 52, at 662.

55. DRINKER, *supra* note 51, at 210; *see* Schwab, *supra* note 51, at 606. For discussion of the business-profession dichotomy in the early United States, see Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 386–87 (2001).

56. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf.

57. *See* Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 115, 115–22 (Robert Granfield & Lynn Mather eds., 2009) (suggesting that elite lawyers at large firms promote the ideals of pro bono, can afford to engage in it, and reap its rewards).

58. *See, e.g.*, Conley & Baker, *supra* note 49, at 793–94 (citing CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS 129 (1996)) (describing study of small firm lawyers who, while struggling to earn a living, believe they offer a public service "by making representation available and affordable to ordinary people").

59. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5), (6) & cmt. 8 (2012) (permitting lawyer to withdraw if client "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services," "such as an agreement concerning fees," or representation creates "unreasonable financial burden").

indicator of excellence, and those who reach the heights of the salary charts generally enjoy admiration among their peers.[60]

Yet the expectation for public interest lawyering is that it exists outside the market for services.[61] Public interest lawyering is frequently depicted as the activity of two groups,[62] for which pecuniary gain is either "incidental"[63] to their work or entirely disconnected from it.[64] The first group is classic public interest lawyers who work at non-profit organizations. Although these lawyers earn income from their positions, salaries correspond to neither hours nor case outcomes and are notoriously low.[65] The second group consists of "conventional"[66] attorneys who work at for-profit firms but engage in "pro bono" work as a volunteer activity.[67] These lawyers take relatively small quantities of time from their jobs or personal lives.[68] They donate their hours to non-profit organizations or indigent persons, as if tithing or contributing a charitable donation.[69]

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60. *See, e.g.*, *Columbia University School of Law*, PRINCETON REV., http://www.princetonreview.com/schools/law/LawBasics.aspx?iid=1035777 (last visited Feb. 17, 2014) (ranking law schools according to category of "Best Career Prospects" based on "[k]ey [s]tatistics" including "[a]verage [s]tarting [s]alary"). One set of lawyers who have attracted significant criticism related to the size of their fees is class action counsel. The particulars of class actions are beyond the scope of this Article, but it is possible that the degree of hostility directed towards class action counsel reflects discomfort with their hybrid public–private role. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 109–12 (2006) (describing original view of class action lawyers as furthering public rights, and change towards criticizing the lawyers and their high fees in the 1980s); *see also id.* at 162–63 (highlighting current discomfort with wealth accumulation by plaintiffs' class action lawyers).

61. *See generally Huge Gap Remains Between Public Interest and Law Firm Attorney Salaries, NALP Reports*, NAT'L JURIST (Sept. 15, 2010), http://www.nationaljurist.com/content/huge-gap-remains-between-public-interest-and-law-firm-attorney-salaries-nalp-reports (highlighting discrepancy between public interest and law firm salaries).

62. One category of lawyers left out of the traditional public interest portrait but increasingly recognized is lawyers employed by government entities. *See, e.g.*, CHEN & CUMMINGS, *supra* note 10, at 152–64; Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 653 (2012); Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657 (2004).

63. POUND, SUPRA NOTE 48, at 4–5.

64. On the history of the split between the "distinct public interest bar" and "elite" lawyers "who served the public only in their limited and separate pro bono efforts," see Pearce, *supra* note 55, at 384, 417–20.

65. *See* Erichson, *supra* note 5, at 2106 (painting image of public interest as financially self-sacrificing); Philip G. Schrag, Why Would Anyone Want to Be a Public Interest Lawyer?, *in* GEORGETOWN LAW FACULTY LECTURES AND APPEARANCES (2009), *available at* http://scholarship.law.georgetown.edu/fac_lectures/1/.

66. *See supra* note 36.

67. *See* Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 83 (2013); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 18 (2004).

68. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012) (setting aspiration of fifty hours of "*pro bono publico* legal services per year"); R. 6.1 cmt. 9 (condoning failure to perform "hours of service" and acknowledging financial donation as substitute).

69. *See* Jacobs, *supra* note 3, at 10 (praising "relief of those who require but cannot afford legal services" as part of "a great tradition of American volunteerism"); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 802–08 (2002)

In both groups, public interest lawyering is the provision of services devalued in the market. It is legal work provided at a rate lower than the legal professional could otherwise earn. In the first case, the legal professional accepts a salary lower than she could garner in the hiring market.[70] In the latter, the work is not part of the lawyer's primary occupation but something in which she engages on the side. Big firms generally separate attorneys' pro bono lawyering from their tallies of billable hours, and the legal services are often offered without expertise in the relevant field.[71] The client in both situations pays a reduced fee, if any. Although serving the public may have been a founding principle of the profession, public interest lawyering has come to be understood as a deviation from the core activity of the legal market.

II: INSTITUTIONAL DEFINITIONS OF PUBLIC INTEREST LAWYERING

Part I described general perceptions of public interest lawyering, and Part II turns to specific ways in which institutions have operationalized the concept. This Part examines: (a) tax benefits conferred on public interest lawyering, which Congress and the Internal Revenue Service have defined by a charitable purpose and compliance with financial and political restrictions; (b) a public interest exception to the profession's prohibition on solicitation of employment, which the Supreme Court and the American Bar Association have defined by the absence of a pecuniary motive; and (c) fee-shifting statutes, which fund public interest lawyering that serves public policies prioritized by Congress.

(describing culture of philanthropy); *id.* at 816 (describing critiques of volunteerism as approach to provision of legal services).

70. *Fact vs. Fiction: Public Interest Careers*, YALE L. SCH., http://www.law.yale.edu/studentlife/cdobrochureshandouts_factvsfictionpicareers.htm (last visited Feb. 19, 2014) ("Getting a permanent public interest job is more challenging than getting a large firm job."); Nita Mazumder, *Myths and Realities of Pursuing Public Interest Careers*, EQUAL JUST. WORKS (Apr. 17, 2012, 1:59 PM), http://www.equaljusticeworks.org/news/blog/myths-and-realities ("Public interest jobs are often incorrectly perceived as employment options for those unable to land a financially lucrative position.."); Debra Cassens Weiss, *Unable to Find Public Interest Jobs, Some Harvard Law Students Settle for BigLaw*, A.B.A. J. (Oct. 29, 2012, 8:32 AM), http://www.abajournal.com/news/article/unable_to_find_public_interest_jobs_some_harvard_law_students_settle_for_bi/ (Assistant Dean for Public Service at Harvard Law reports that in searching for jobs students "work four times as hard to get a quarter of the money in public interest." (internal quotation mark omitted)).

71. *See* Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2395 (2010) (documenting inadequate knowledge and supervision of volunteer attorneys); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2071–72 (2008) (documenting scarcity of volunteer attorneys with relevant skills and inefficiencies of work by inexperienced counsel); *cf.* Cummings & Rhode, *supra*, at 2429 (documenting that some firms seek to develop expertise in particular areas and channel volunteer efforts in those directions). Note that the inexperience of volunteer attorneys is not a coincidence but more likely the direct result of intentionally avoiding fields where the lawyers perform their "real work" for paying clients. *See infra* notes 324–25 and accompanying text.

A. Tax Benefits

The classic understanding of a "public interest law firm" is a non-profit law firm.[72] From pro bono requirements to loan assistance programs, institutions rely on non-profit status as a key indicator of public interest lawyering.[73] Before analyzing the descriptive and normative value of this nomenclature, below is a brief review of the regulatory benefits and burdens of non-profit organizations and public interest law firms organized as such. As described below, federal law supports the growth of non-profit, public interest law firms but also imposes significant restrictions on their activities.

1. Tax-Exempt Non-Profits

Non-profit organizations are corporations formed for a public purpose,[74] which generally enjoy special tax treatment in exchange for accepting certain limits on their activities.[75] The most common non-profit organization[76] is the charitable organization, or charity, defined by Section 501(c)(3) of the Internal Revenue Code.[77] One benefit of recognition as a 501(c)(3) organization is that the organization is exempt from paying federal income taxes.[78] Arguably even more significant, donations to a 501(c)(3) organization are deductible from the income tax calculations of individual and corporate donors, which may encourage donations.[79]

To qualify as a charity under Section 501(c)(3), an organization must meet three core requirements: it must be organized and operated exclusively for a public purpose as defined in the statute; it must comply with limits on handling of corporate assets; and it must comply with limits on political activities.[80] So long as the organization "serves a public

72. *See, e.g.*, CHEN & CUMMINGS, *supra* note 10, at 127; *see also* George Norris Stavis, Note, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-profit Litigators?*, 31 COLUM. HUM. RTS. L. REV. 209, 227–30 (1999) (describing revenue limits for public interest law firms). *See generally* Houck, *supra* note 12, at 1438–54 (describing history of public interest law firms and non-profit status).

73. *See supra* notes 3-6.

74. 26 U.S.C. § 501(c)(3) (2012); *see also* Treas. Reg. § 1.501(c)(3)-1(d)(1) (as amended in 2008). A non-profit organization is formed by filing bylaws or articles of incorporation with a state agency, pursuant to corporate laws of the relevant state. *See* INTERNAL REVENUE SERV., PUBLICATION 557: TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 5 (2013), *available at* http://www.irs.gov/pub/irs-pdf/p557.pdf. The non-profit corporation can then apply to the federal government and the state for exempt status with respect to tax laws. *See, e.g.*, Treas. Reg. § 1.501(a)-1(a)(2) (as amended in 1982).

75. *See* 26 U.S.C. § 501(a).

76. *Setting Up a Nonprofit Tax-Exempt Corporation*, SPARC, http://www.arl.org/sparc/publications/papers/setting_up_a_nonprofit.shtml (last visited Feb. 19, 2014). Many use the term "non-profit" to mean the 501(c)(3) charitable organization, but there are twenty-nine different kinds of non-profits under the Internal Revenue Code. *See* 26 U.S.C. § 501(c)(1)–(29).

77. 26 U.S.C. § 501(c)(3).

78. *Id.* § 501(a), (c).

79. *Id.* § 170(a)(1), (c)(2).

80. *Id.* § 501(c)(3). The full language of Section 501(c)(3) is as follows:

rather than a private interest,"[81] the particular purpose can be broadly defined. Section 501(c) specifies that the non-profit corporation may be organized and operated "for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals."[82] Although the IRS originally interpreted "charitable" to mean relief of the poor, it has since determined that the term "charitable" is a more general reference to any of the listed public purposes.[83]

The other requirements for charities—the financial and political limitations—are more restrictive than the public purpose requirement. Non-profit organizations may actually earn profits in that they may earn revenue higher than expenses, but the organizations are limited in how they handle those funds. Assets and income may not be distributed to individuals, except as fair compensation for services, and the organization may not be used for personal gain.[84] Additionally, attempting to influence legislation, or supporting or opposing a candidate for public office, may not comprise a substantial part of a charity's activities.[85]

2. Public Interest Law Firms

The Internal Revenue Service (IRS) recognizes the "public interest law firm" (PILF)[86] as a type of charity exempt from income taxes under Section 501(c)(3) of the Internal Revenue Code.[87] The IRS indicates that, although the substance of PILF work need not be "unique" to the non-

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> List of exempt organizations. The following organizations are referred to in subsection (a): . . . Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.; *see also id.* § 501(h) (allowing charitable organizations to spend a limited amount on lobbying, defined in proportion to the each organization's annual expenditures); Treas. Reg. § 1.501(c)(3)-1(a)(1) (as amended in 2008) (organizational and operational tests); *id.* § 1.501(c)(3)-1(c)(2); *id.* § 1.501(c)(3)-1(c)(3).

81. *Id.* § 1.501(c)(1)-1(d)(1)(ii).

82. 26 U.S.C. § 501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(a).

83. Steven D. Simpson, *Tax-Exempt Organizations: Organizational and Operational Requirements*, 869 TAX MGM'T PORTFOLIO at A-109 (2008).

84. 26 U.S.C. § 501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(c)(2).

85. 26 U.S.C. § 501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(c)(3).

86. The acronym "PILF" is used only for public interest law firms recognized as such under federal tax law.

87. Rev. Proc. 92-59, 1992-2 C.B. 411.

profit sector, it must concern "issues of significant public interest."[88] The "[c]haritable classification is based not upon the particular positions advocated, but upon the fact that legal representation is made available in important cases where it would not be available from private firms."[89] The rationale for recognizing PILFs as charitable organizations is that, because of their legal work, "courts and administrative agencies are afforded the opportunity to review issues of significant public interest."[90]

In Revenue Procedure 92-59, the IRS sets out guidelines that PILFs must follow in addition to the general requirements of Section 501(c)(3).[91] A major focus of these guidelines is to limit the acceptance of legal fees.[92] Shortly after the IRS first recognized PILFs as charities,[93] it issued guidelines forbidding such firms from accepting fees from clients[94] on the basis that "charging or accepting fees from clients makes the organization indistinguishable from a private law firm."[95] The IRS did permit acceptance of fees if awarded by a court or administrative agency, or if paid by an opposing party, if the PILF derived most of its financial support from grants and contributions.[96] Yet the IRS specified that the possibility of a fee award could not be a substantial motivating factor in the selection of cases.[97] Moreover, PILFs were required to "cease to handle issues with a strong possibility of a fee award if these become economically feasible for private litigants."[98] The IRS revised these guidelines in 1992 to permit PILFs to accept fees directly from clients,[99] but it imposed new requirements "to distinguish a public interest law firm's practice from the private practice of law."[100]

The current Revenue Procedure restricts PILFs' finances in a number of significant ways. First, to maintain its charitable status, a PILF must cover no more than fifty percent of its operating costs with attorneys' fees.[101] The organization is required to rely on donors. Under this definition, a public interest case cannot be economically self-sufficient. Second, fees paid by clients may not exceed the actual costs of litiga-

88. *See* INTERNAL REVENUE SERV., *Litigation by IRC 501(c)(3) Organizations*, *in* 1984 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM TEXT (1984), *available at* http://www.irs.gov/pub/irs-tege/eotopicd84.pdf, *superseded in part by* Rev. Proc. 92-59.

89. *Id.*

90. Rev. Rul. 75-74, 1975-1 C.B. 152.

91. Rev. Proc. 92-59.

92. *Id.*

93. *See* Rev. Proc. 71-39, 1971-2 C.B. 575.

94. Rev. Proc. 75-13, 1975-1 C.B. 662, *modified and superseded by* Rev. Proc. 92-59.

95. Rev. Proc. 92-59 § 2(03) (interpreting Rev. Rul. 75-75, 1975-1 C.B. 154).

96. Rev. Rul. 75-76, 1975-1 C.B. 154.

97. Rev. Proc. 92-59 § 4(03).

98. *Id.* § 2(04).

99. *Id.* § 2(05)–(06); *see also* COUNCIL FOR PUB. INTEREST LAW, *supra* note 26, at 306–11 (noting fee restrictions adopted in 1970 and suggesting that the IRS should allow public interest firms to accept client fees).

100. Rev. Proc. 92-59 § 2(06).

101. *Id.* § 4(05).

tion.[102] While costs may be charged against a retainer with any remaining balance refunded,[103] a contingency fee agreement would likely be impermissible given that a percentage of a client's award might exceed the actual costs incurred. This is worth noting because contingency fee agreements are one of the market-based mechanisms by which lawyers can earn a living while representing clients unable to pay fees with their own financial assets.[104] Third, to maintain favorable tax status, the lawyers for the PILF may not consider the likelihood or probability of a fee when selecting cases.[105] Presumably, this requirement aims to omit the distraction of a potential for private gain so lawyers focus on their public purpose. Finally, even if a case is of "sufficient broad public interest" to justify representation under the organization's mission,[106] the organization may not accept any case "if the organization believes the litigants have a sufficient commercial or financial interest in the outcome of the litigation to justify retention of a private law firm."[107] Although the IRS does not indicate what level of financial interest would be "sufficient . . . to justify retention of a private law firm," it is clear that the case must be unattractive in the regular market for services.

3. What Public Interest Law Firms Are Not

The IRS distinguishes the PILF from legal aid and civil rights organizations.[108] Legal aid and civil rights organizations gained recognition as charitable organizations based on the definition of "charitable" under regulations issued by the Treasury Department pursuant to Section 501 of the Internal Revenue Code.[109] Treasury Regulations define "charitable" to include:

> [r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by

102. *Id.* § 5(01). Additionally, a public interest law firm may not withdraw from representation due to a client's failure or inability to pay. *Id.* § 5(02).

103. *Id.* § 5(01).

104. In theory, a public interest law firm could draft a retainer agreement to award fees as a percentage of winnings, with an express caveat that the amount could not exceed the costs of litigation, but this would necessarily undercut the utility of a contingency agreement. Contingency fee arrangements are designed to reflect a lawyer's acceptance of a risk of low or no fees. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270–71 (1998). Particularly when one considers an attorney's practice as an interrelated portfolio, the value of any one case must carry the potential to compensate for more than the costs of litigation measured in terms of time and tangible resources expended. Another possible source of funding could be third parties, but third parties can change the dynamics and present their own complications. *See generally* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).

105. Rev. Proc. 92-59 § 4(03).

106. *Id.* § 4(04).

107. *Id.*

108. INTERNAL REVENUE SERV., *supra* note 88.

109. *See* Treas. Reg. §§ 1.0-1–802 (as amended in 2014).

> organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.[110]

Legal aid organizations serving poor clients received recognition as tax-exempt charities in 1969, based on the first clause of this provision.[111] Highlighting that the Treasury Regulation had defined "charitable" to include "relief of the poor and distressed," the IRS determined that providing free legal services to indigent persons otherwise incapable of obtaining such services qualified as a charitable purpose.[112] Organizations providing such services therefore qualified as tax exempt.[113] Ten years later, the IRS recognized a broader exemption and included organizations that charged modest fees.[114] It determined that charging an hourly fee to clients did not negate an organization's charitable purpose where the fee was based on the ability to pay, not the type of services provided.[115] The decision reasoned that, despite charging a modest fee, the organization still provided economic relief to the poor and distressed.[116]

Civil rights organizations, including those with a focus on litigation like the ACLU and the NAACP Legal Defense Fund (LDF),[117] received recognition as charities on the basis that they "defend human and civil rights secured by law,"[118] another charitable purpose recognized by the same Treasury Regulation.[119] The IRS recognizes that human and civil rights include not only constitutional but also statutory rights.[120] Litigation to "defend . . . rights secured by law" also includes that which seeks to broaden the definition of a legally recognized right.[121]

The IRS was slower to recognize PILFs as tax-exempt non-profits than to confer this benefit on legal aid or human and civil rights organizations.[122] This may be due to the definitional challenges PILFs present: their work does not fit the traditional conception of charity.[123] Legal aid

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110. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2008).
111. Rev. Rul. 69-161, 1969-1 C.B. 149.
112. *Id.* (internal quotation marks omitted).
113. *Id.*
114. Rev. Rul. 78-428, 1978-2 C.B. 177.
115. *Id.*
116. *Id.* Note there is a difference between indigency, inability to afford representation despite mid-level income, and lack of economic incentives to pursue legal representation. The IRS did not recognize, or at least did not explore, these distinctions.
117. *See* Nicole T. Chapin, Note, *Regulation of Public Interest Law Firms by the IRS and the Bar: Making It Hard to Serve the Public Good*, 7 GEO. J. LEGAL ETHICS 437, 442 (1993).
118. Rev. Rul. 73-285, 1973-2 C.B. 174; Rev. Rul. 68-438, 1968-2 C.B. 209.
119. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2008).
120. INTERNAL REVENUE SERV., *supra* note 88.
121. Treas. Reg. § 1.501(c)(3)-1(d)(2).
122. *See* Houck, *supra* note 12, at 1446.
123. *Id.* at 1446–47.

organizations represent indigent clients.[124] Although the IRS does not explicitly limit the client population served by civil and human rights organizations, commentators have assumed that such organizations represent minorities.[125] PILFs, in contrast, focus their representation on neither the poor nor minorities;[126] PILFs do not limit their client base to any particular class. A PILF may also represent a client on either side of an issue, whereas civil or human rights organizations serve specifically to defend civil and human rights.[127] When the IRS did recognize PILFs, the key substantive requirement imposed was simply that the cases be of "significant public interest."[128] The definition of PILFs depended primarily on financial restrictions, not the substance of the work.[129]

Although both Congress and the IRS aim to support public interest lawyering pursued by the non-profit sector, the regulation of PILFs reveals the tension between doing so and maintaining viewpoint neutrality.[130] The next section of the Article addresses another area in which legal actors struggle with the appropriate role of government in defining public interesting lawyering: the solicitation doctrine.

B. Exception to Regulation

The regulation of solicitation provides a window into how the Supreme Court and the profession, as represented by the American Bar Association, define public interest lawyering. Although in-person solicitation is no longer the major form by which lawyers attract new clients,[131] it is one of the only areas in which the Supreme Court has offered a detailed examination of how to distinguish public interest lawyering

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124. Rev. Rul. 69-161, 1961-1 C.B. 149.

125. Rev. Rul. 73-285, 1973-2 C.B. 174. *See* Houck, *supra* note 12, at 1446 (suggesting civil rights organizations represented minorities, while PILFs often represented "diffuse majorities" concerned with environmental protection, consumer health, and other issues (quoting Benjamin W. Heineman, Jr., *In Pursuit of the Public Interest*, 84 YALE L.J. 182, 183 (1974) (reviewing SIMON LAZARUS, THE GENTEEL POPULISTS (1974)) (internal quotation marks omitted)).

126. *See* Rev. Proc. 92-59, 1992-2 C.B. 411.

127. *See id.*

128. INTERNAL REVENUE SERV., *supra* note 88. In contrast to both PILFs and civil and human rights organizations, legal aid organizations provide legal services in "routine personal problems" related to family, criminal, and consumer matters. *See id.*

129. Rev. Proc. 92-59.

130. Coming to terms with conservative PILFs is a challenge for progressives. Oliver Houck argued in *With Charity for All*, *supra* note 12, that foundations created and directed by business corporations can be distinguished from PILFs because the rationale for and definition of public interest practice is "access for unrepresented issues to the judicial system," which the corporate interest groups do not serve. Houck, *supra* note 12, at 1449. Houck makes very compelling arguments, but access is not a complete definition of and purpose for public interest lawyering, so this distinction does not answer the question for all contexts. Part of the problem when imagining a substantive conception of public interest lawyering is that the liberal U.S. political system seeks a neutral government. Both to avoid viewpoint discrimination challenges and because of a genuine belief in a particular view of the role of government, legislatures are wary of making values-based distinctions. Yet avoiding values is constricting, if it is even possible. For a critique of the neutrality principle in liberalism, see SANDEL, *supra* note 22, at 3–24.

131. Schwab, *supra* note 51, at 607–10 (describing decrease in solicitation).

from the rest. As will be discussed below, the solicitation doctrine replicates the dichotomy between public interest and profit.

1. Solicitation Is Discouraged

When the legal profession first developed in England, barristers viewed solicitation as unseemly.[132] This was so, at least in part, because barristers came from wealthy families and did not depend on income from their work.[133] They believed seeking business to be distasteful; such activity belonged to tradesman and was unbecoming to professionals engaged in a higher calling of public service.[134]

The ranks of lawyers swelled in the nineteenth century in the United States.[135] Once states expanded eligibility for practice, many chose to pursue the profession.[136] Unlike their predecessors, many of these attorneys were immigrants or persons from lower classes.[137] To manage the newcomers, states drafted codes of ethics.[138] By 1908, the American Bar Association had formed and issued the Canons of Professional Ethics, which included a clear prohibition on solicitation of employment.[139]

Since its beginning, this prohibition has applied primarily to solicitation for pecuniary gain. Despite the absence of an express limitation in the Canons, the Supreme Court interpreted this limitation to have been assumed by the drafters.[140] When the ABA issued the Model Code of Professional Responsibility in 1969, the Code included a broad ban on solicitation "for compensation."[141] The first version of the Model Rules of Professional Conduct included a ban on attorney solicitation "when a significant motive . . . is . . . pecuniary gain."[142] That language remains in the Rule today. The current Model Rule 7.3(a) prohibits lawyers from engaging in "in-person, live telephone or real-time electronic contact solicit[ation of] professional employment from a prospective client [with

132. *See* DRINKER, *supra* note 51, at 210–11; *see also* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 72 (1935).

133. *See supra* notes 52–56 and accompanying text.

134. Louise L. Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 377–78 (1990); Schwab, *supra* note 51, at 606.

135. RICHARD L. ABEL, AMERICAN LAWYERS 40–44 (1989).

136. Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 GEO. J. LEGAL ETHICS 393, 396 (1991).

137. ABEL, *supra* note 135, at 85–90.

138. *See id.* at 112–13, 119, 124–25. For a discussion of the stratification of the legal profession and the use of ethics codes to limit newcomers from capturing business or sullying the professional image, see SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900, at 67–90, 206–39 (1991). *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

139. For literature on the class-based elements of anti-solicitation rules, particularly as applied to personal injury lawyers, see Pearce, *supra* note 55, at 396–97. Whereas elite, big firm lawyers connected with clients in country clubs, lower classes of lawyers scrambled and solicited. *See id.*

140. *In re* Primus, 436 U.S. 412, 437 n.31 (1978) (analyzing bar opinions).

141. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-3 (1980).

142. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2012).

whom she has had no prior relationship] when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[143]

2. Public Interest Exception

While acknowledging rationales for a prohibition on solicitation,[144] the Supreme Court in 1963 recognized an exception for public interest lawyering.[145] In *NAACP v. Button*, the Court concluded that interference with the NAACP's solicitation efforts threatened the viability of litigation intended to enforce constitutional rights of racial minorities.[146] The Court ruled that a solicitation prohibition by the State of Virginia unduly restricted the freedoms of speech and association, in violation of the First Amendment.[147] Although the Court's opinion reflected the constitutional claims of the underlying litigation,[148] the Court emphasized the absence of any pecuniary motive on the part of the NAACP LDF lawyers.[149]

To distinguish solicitation for desegregation litigation from the historically disreputable activities of champerty and maintenance,[150] the majority made a point of highlighting the relative poverty of civil rights lawyers.[151] It explained that their work generated less income than that earned for equivalent private professional work.[152] In spite of a dissent by Justice Harlan, pointing out that, pursuant to fee-shifting statutes, the NAACP LDF lawyers do, in fact, earn fees from desegregation litigation,[153] the majority stated broadly that "[l]awsuits attacking racial discrimination, at least in Virginia, are n[ot] very profitable."[154]

The Supreme Court again contrasted public interest lawyering with profit in *In re Primus*[155] and *Ohralik v. Ohio State Bar Ass'n.*[156] Edna

143. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2012).
144. *See* NAACP v. Button, 371 U.S. 415, 439–43 (1963).
145. *Id.* at 428–29, 434–36, 441–44.
146. *Id.* at 434–36.
147. *Id.* at 428–29, 444.
148. *Id.* at 428, 444.
149. *Id.* at 441–43.
150. Intervention in the lawsuit of another has always carried a negative taint, and yet, at various points in history, an exception has been recognized to serve the public interest. In Ancient Greece, only judges, parties, and the personal supporters of parties were to be involved in trials. Radin, *supra* note 132, at 48–49. Starting in the sixth century B.C., intervention on a stranger's behalf was permitted if the injured party could not effectively appear against a more powerful adversary. *Id.* at 49. Assistance for the less powerful party was understood to serve the public interest. *Id.* As this practice developed in Rome, the intervenor was explicitly recognized as the representative of the public, with his client identified as the *populus Romanus*. *Id.* at 49.
151. *Button*, 371 U.S. at 443–44.
152. *Id.* at 420–21.
153. *Id.* at 457 (Harlan, J., dissenting).
154. *Id.* at 443 (majority opinion). Not surprisingly, the majority cited no evidence in the record to support these conclusions. *Id.* This observation is not intended to minimize the impact of boycotts and other penalties exacted on desegregation lawyers, but to demonstrate how the Court's decision, which made no direct reference to such context, inadvertently constructed a portrait of public interest litigation that now threatens its financial viability. *See infra* Part IV.C.
155. 436 U.S. 412 (1978).
156. 436 U.S. 447 (1978).

Primus practiced as a member of a private, for-profit firm and served as a paid consultant to a non-profit organization, the South Carolina Council on Human Relations (SCCHR).[157] Ms. Primus also cooperated on cases with the American Civil Liberties Union (ACLU) on a volunteer basis and served as an officer of the local chapter of the ACLU.[158] The solicitation arose when a community member invited Ms. Primus to speak with a group of low-income women who had been sterilized as a condition of receiving Medicaid assistance.[159] Ms. Primus met with the women and informed them of their constitutional rights.[160] She later contacted one of the attendees, sending her a letter with an offer of free legal representation by the ACLU.[161]

In response, the Secretary of the Board of Commissioners on Grievances and Discipline of the State of South Carolina charged Ms. Primus with solicitation in violation of the state's ethical canons.[162] Specifically, the Secretary claimed Ms. Primus had promoted the services of an organization whose primary purpose was the provision of legal services and given unsolicited advice to join a prospective class action.[163] The state supreme court ordered that she receive a public reprimand.[164] Ms. Primus appealed to the U.S. Supreme Court, which ruled in her favor, finding that that South Carolina had violated her First Amendment rights of expression and association.[165] Making direct comparisons between the NAACP and the ACLU,[166] the Court explained that, for both organizations, litigation was "not a technique of resolving private differences."[167] Citing literature on public interest law and private attorneys-general,[168] the decision emphasized the larger public purpose of the work and

157. *In re Primus*, 436 U.S. at 414–15.
158. *Id.* at 414.
159. *Id.* at 415.
160. *Id.* at 416.
161. *Id.*
162. *Id.* at 417.
163. *Id.* at 420–21.
164. *Id.* at 421.
165. *Id.* at 439. The Court had first introduced the concept of a "right to advocate" in *NAACP v. Alabama ex rel. Patterson*, holding that the First Amendment protected "freedom to engage in association for the advancement of beliefs and ideas." 357 U.S. 449, 460–61 (1958). That opinion highlighted the "close nexus between the freedoms" of association, assembly, and speech, and emphasized that association is often necessary to realize "[e]ffective advocacy." *Id.* at 460. Following *Button*, the Court also extended First Amendment protection to communications in support of workers' compensation claims, which the Court did not recognize as political, but the discussion of which was protected as part of union members' right of association. *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585–86 (1971); United Mineworkers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 225 (1967).
166. *In re Primus*, 436 U.S. at 427.
167. *Id.* at 428 (quoting NAACP v. Button, 371 U.S. 415, 429 (1963)) (internal quotation mark omitted).
168. *Id.* at 414 n.2 (citing, *inter alia*, Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 211–12 (1976); Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 576 (1949)).

demonstrated the Court's developing conception of public interest lawyering.[169]

This portrait of public interest lawyering contrasted with working for a fee. The Court labored over the facts to show that Ms. Primus lacked a pecuniary motive. Rather than simply concluding that, Ms. Primus's solicitation constituted an expression of political ideas because of the substance of the underlying lawsuit, the Court highlighted the distance between Ms. Primus and any pecuniary gain that might result from it.[170] The Court devoted attention to the fee agreement between the ACLU and cooperating attorneys, recognizing that the ACLU could collect fees under the governing fee-shifting statute if the organization prevailed.[171] The Court determined, however, that Ms. Primus's income did not depend on the outcome of the litigation.[172]

The same day the Court ruled that Ms. Primus's solicitation "to advance 'beliefs and ideas'" deserved constitutional protection,[173] it issued a companion decision, *Ohralik v. Ohio State Bar Ass'n*, holding that "ordinary" solicitation did not.[174] Mr. Ohralik, a solo practitioner in Ohio, solicited two clients after an uninsured driver crashed into the car in which the clients were traveling.[175] Mr. Ohralik provided the clients with accurate advice about their legal rights and responsibilities, including their entitlement to recover $12,500 each from an insurance company.[176]

Mr. Ohralik's behavior was, however, unusually aggressive and potentially fraudulent. Mr. Ohralik solicited the clients, two 18-year-old women, when one lay in a hospital bed and the other had returned home from the hospital only a day earlier.[177] Under such circumstances, a reasonable person might have questioned whether these individuals voluntarily elected to engage Mr. Ohralik's services. Perhaps even more troubling, without prior permission or notice, Mr. Ohralik tape-recorded conversations with one of the clients and with the other's parents.[178] Finally, when the clients attempted to discharge him, he insisted that the repre-

169. *Id.* at 437–38.

170. *Id.* at 428–29. As Louise Hill has observed, the *Primus* Court ignored how intertwined the ACLU's and Ms. Primus's interests were. *See* Hill, *supra* note 136, at 404–05. All three members of Ms. Primus's law firm worked with the ACLU; two volunteered and one was a staff attorney. *In re Primus*, 436 U.S. at 418 n.8. Ms. Primus was also engaged as a consultant by the SCCHR, the organization that invited her to speak to the potential plaintiffs. *Id.* at 415.

171. *In re Primus*, 436 U.S. at 429–31.

172. *Id.* at 436 n.30.

173. *Id.* at 438 n.32.

174. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977)).

175. *Id.* at 449–50.

176. *Id.*

177. *Id.* at 450–51.

178. *Id.*

sentation agreements were binding.[179] He ultimately sued one of them for breach of contract.[180]

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found that, by engaging in solicitation, Mr. Ohralik had violated the Ohio Code of Professional Responsibility.[181] The Ohio Supreme Court held that the First Amendment did not protect Mr. Ohralik, and, in addition to the public reprimand, his license ought to be indefinitely suspended.[182] The U.S. Supreme Court agreed.[183]

The Justices could have distinguished this case from *In re Primus* based on the coercive and fraudulent nature of Mr. Ohralik's conduct,[184] but the majority instead focused on his profit motive.[185] Mr. Ohralik offered representation in exchange for a contingency fee; he would receive one third of any award obtained, but, if he failed to secure any relief, he would earn nothing.[186] Research demonstrates that contingency fee agreements actually provide a method of securing legal services for persons without sufficient means to pay upfront,[187] but this did not enter into the Court's analysis.[188]

The Court interpreted Mr. Ohralik's attempt to gain "remunerative employment" as a proposal for "a business transaction."[189] It characterized his solicitation as commercial speech comparable to advertising[190] but even more dangerous because of its live, in-person format.[191] The Court had previously recognized truthful, nondeceptive advertising as valuable for delivering information to the public and therefore entitled to limited First Amendment protection.[192] The Court recognized no special

179. *Id.* at 451–52.
180. *Id.* at 452.
181. *Id.* at 453–54.
182. *Id.*
183. *Id.* at 454.
184. *Id.* at 467–68 (describing Mr. Ohralik's conduct as a "striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation").
185. *Id.* at 464 (reasoning that presence of a pecuniary motive is "inherently conducive to overreaching and other forms of misconduct").
186. *Id.* at 450–51.
187. *See supra* note 104 (describing market role of contingency fees).
188. Indeed, the Court apparently took exception to Mr. Ohralik's characterizing the contingency fee arrangement as one in which the client would not have to pay with her own assets. *See Ohralik*, 436 U.S. at 467 ("He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer."); *id.* at 451 n.4 ("In explaining the contingent-fee arrangement, appellant told Wanda Lou that his representation would not 'cost [her] anything' because she would receive two-thirds of the recovery if appellant were successful in representing her but would not 'have to pay [him] anything' otherwise." (alterations in original)).
189. *Id.* at 457.
190. *Id.* at 454.
191. The *Ohralik* majority distinguished *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (striking down prohibition on attorney advertising), on the grounds that in-person solicitation poses more of a danger of coercion than print advertising. *See Ohralik*, 436 U.S. at 455.
192. *Id.* at 455–56 (discussing lower level of protection for commercial speech as defined after Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

test for advertising by attorneys.[193] In the *Ohralik* majority's view, a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation."[194] The Court drew a bright line between remunerative employment and public interest lawyering.

Once the majority in *Ohralik* found that the lawyer did have a pecuniary stake in the outcome, the Court made no assessment as to the public value of the lawyer's work. Only Justice Marshall, in his concurrence, noted that Mr. Ohralik had in fact provided the two clients with accurate information about their rights.[195] The other Justices saw Mr. Ohralik's pecuniary motive as central,[196] and therefore viewed the substantive value of his work as irrelevant, or else saw the public value of Mr. Ohralik's work as so minimal as not to deserve mention. Given the facts, it is also possible that the Justices viewed Mr. Ohralik's conduct as so troubling that no degree of public value in the work could possibly justify his behavior. If so, the Court still could have distinguished the improper manner of his conduct from whether his motive was pecuniary. Yet the Justices grounded their decision in Mr. Ohralik's apparent goal of pecuniary gain.[197] The Court stated without explanation that Mr. Ohralik not only did not but "could not" have made an argument based on political expression or freedom of association.[198]

Representing accident victims could, however, include both profitable and political components. This argument could be strong in a case where an attorney aggregates multiple parties' claims against large corporate defendants and alters industry practices.[199] Even Mr. Ohralik accurately advised non-wealthy individuals to recover health care costs

193. *Cf.* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536–48 (2001) (striking down funding conditions that prohibited lawyers from challenging welfare laws on grounds of special expressive value of lawyers' communications); *see id.* at 562 (Scalia, J., dissenting) (accusing majority of "improper special solicitude for our own profession"); *see also* Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantánamo*, 44 U.C. DAVIS L. REV. 1487, 1508–12 (2011) (analyzing role of lawyers' speech as portrayed by *Velazquez* majority).

194. *Ohralik*, 436 U.S. at 459.

195. *Id.* at 473 (Marshall, J., concurring).

196. *Id.* at 464 (majority opinion) (reasoning that the presence of a pecuniary motive is "inherently conducive to overreaching and other forms of misconduct" and likely to result in unacceptable harm to the client).

197. *Id.* (explaining that the state necessarily has a strong interest in preventing solicitation where there is a pecuniary motive for the purpose of protecting the public).

198. *Id.* at 458.

199. *See* Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 96 (Austin Sarat & Stuart Scheingold eds., 2001); Erichson, *supra* note 5, at 2093–101 (exploring motives of mass tort lawyers); *id.* at 2094 n.28 (collecting relevant literature on mass tort lawyers).

from a corporate insurer; perhaps this, too, could be considered a form of public interest lawyering.[200]

The Court's jurisprudence reflects a broader ambivalence as to whether litigation for profit can be a method of vindicating public rights, and where public interest lawyering fits in relation to the norms of the profession.[201] As for whether the potential to earn a fee makes lawyers' communications unworthy of protection, members of the Court have acknowledged that earning a living is not mutually exclusive from pursuing public aims, and that the divide between professionalism and remuneration is largely an artifact of an earlier age, disconnected from "the real-life fact that lawyers earn their livelihood at the bar."[202] Yet, in deciding the companion cases of *Primus* and *Ohralik*, the Court leaned heavily on the notion that some but not all solicitation is in the public interest, and that public interest lawyering is incongruous with the presence of any pecuniary motive.

Solicitation doctrine is an area where public interest lawyering has been defined in opposition to that which generates a fee. The next section of the Article will address an area that turns this model on its head.

C. Fee-Shifting Statutes

Congress has repeatedly affirmed a major category of financial support for private litigation in the public interest: fee-shifting statutes. For certain statutes, the private enforcement of which Congress believes serves the public interest, Congress has created judicial authority to allow prevailing plaintiffs to receive full attorneys' fees from defendants. It is notable that Congress chose not only to encourage potential plaintiffs to enforce these statutes, which it might have done by other means,[203] but also specifically to foster representation by skilled attorneys through financial incentives. Fee-shifting statutes therefore offer an interesting window into which statutes and what kinds of lawyering Congress has determined would serve the public interest, and they

200. *See* Susan D. Carle, *Re-valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 729–32, 736–37 (2001); *see also* Cummings, *supra* note 14, at 10 (defining "private [public interest law] firms to include for-profit legal practices whose core mission is to advance a vision of the public interest that enhances legal and political access for underrepresented groups or pursues a social change agenda that challenges corporate or governmental power").

201. *Compare, e.g.*, *Ohralik*, 436 U.S. at 460 ("Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 674 (1958)) (internal quotation mark omitted)), *with id.* at 458–59 (distinguishing public interest lawyering with political, expressive, or associational value as an exception to the mainstream of lawyers' "remunerative employment").

202. Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977); *see also Ohralik*, 436 U.S. at 460.

203. As examples of alternative approaches, a statute could sanction waiver of filing fees to decrease barriers to litigation or expand categories of available damages to increase plaintiffs' financial incentives.

demonstrate the legislature's recognition of the need to make such lawyering financially viable.

Fee-shifting contrasts with the general rule about availability of counsel in the United States.[204] The traditional rule is that each party pays all costs of participating in any civil lawsuit, including the costs of hiring a legal representative.[205] As a corollary to that principle, if a party cannot pay the costs of participation in a civil matter, with limited exceptions,[206] there is no guarantee that the government or any private party will cover the costs.[207] Generally, if a party lacks the means to pay a lawyer, it might be unable to pursue litigation or it might be forced to do so *pro se*.[208] Fifty years after *Gideon v. Wainwright*,[209] no federal constitutional decision has promised payment for legal representation in civil matters.[210]

Fee-shifting statutes, however, suggest a different approach. Congress has passed extensive fee-shifting legislation that authorizes judges in certain categories of cases to shift the cost of legal representation from prevailing plaintiffs to the defendants against whom they have prevailed.[211] Most of these statutes include the following language: a "court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[212] While the lan-

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204. For a history of the American rule, see generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

205. *See generally* Resnik, *supra* note 29, at 2130–37 (introducing concept of "unaided access" as premise of the U.S. civil justice system).

206. If indigent, a party may request a waiver of court fees.

207. As is well-known, *Gideon v. Wainwright* recognized a constitutional right to counsel in criminal matters, but the same does not apply in civil proceedings. 372 U.S. 335, 339–40, 343 (1963); *see* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (ruling that, even if incarceration is at stake, there is no guaranteed right to appointed counsel in civil cases); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (denying right to appointed counsel in parental termination proceeding).

208. *See* Rhode, *supra* note 49, at 597 (highlighting that allocation of lawyers based on market forces influences individual outcomes).

209. 372 U.S. 335 (1963).

210. *See* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 36–37 (2013) (describing civil right to counsel movement); Earl Johnson Jr., *50 Years of Gideon, 47 Years Working Toward a 'Civil Gideon'*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 35 (2013).

211. *See* Marek v. Chesny, 473 U.S. 1, app. at 44–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions).

212. *See, e.g.*, 42 U.S.C. § 1988(b) (2012). The Civil Rights Attorney's Fee Awards Act of 1976 (CRAFAA) was one of the first of the modern fee-shifting provisions, and many other provisions track this language. *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1093–94 (2007). Congress passed CRAFAA in direct response to the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which had held that courts lacked the authority to award fees to prevailing plaintiffs in the absence of a specific statutory mandate. Albiston & Nielsen, *supra* at 1093–94. For an analysis of the legislative response to *Alyeska*, and the Supreme Court's further response to CRAFAA and similar statutes, see generally Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990).

guage may appear neutral as to the identity of the prevailing party,[213] the statutes serve to support work by lawyers striving to enforce these statutes and serve the public values behind them. The Supreme Court specifically recognized this aspect of fee-shifting statutes in a pair of cases, *Newman v. Piggie Park Enterprises, Inc.*[214] and *Christiansburg Garment Co. v. EEOC*,[215] holding that fees are to be awarded to prevailing plaintiffs in virtually all cases,[216] while prevailing defendants may be awarded fees only in highly exceptional ones.[217]

Congress created fee-shifting provisions where it decided that pursuit of litigation, with the assistance of counsel, was in the public interest. Congress did not use statutory authority to restructure the civil justice system and provide fees for all prevailing plaintiffs. This approach could have supported retention of counsel by parties with meritorious claims and arguably increased the deterrent value of all civil laws. Yet Congress adopted the approach of creating fee-shifting provisions only for constitutional and statutory rights whose enforcement has special public value.[218]

In fee-shifting jurisprudence, Congress and the Supreme Court have indicated that some civil litigation has value beyond serving the substantive or procedural rights of the litigants. In those areas, Congress has seen fit to authorize the reimbursement of attorneys pursuing the cases so that attorneys will, in fact, pursue them.[219] These statutory provisions span areas including civil rights, workers' rights, consumers' rights, freedom of information, and environmental protections, among others.[220]

Congress designed fee-shifting provisions as an exception to the traditional American rule for the purpose of encouraging and sustaining legal representation in areas that serve the public.[221] It is important to recognize that the fee-shifting provisions indicate not only that Congress wanted aggrieved persons to pursue certain categories of cases, but also that Congress wanted lawyers to represent the plaintiffs in those cases. The fee-shifting provision does not provide an additional reward to plaintiffs who pursue claims; it rewards only those plaintiffs who secure representation. In theory, Congress could have created a new category of

213. *See, e.g.*, S. REP. NO. 94-1011, at 3–4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910–11 (1976).

214. 390 U.S. 400 (1968) (per curiam).

215. 434 U.S. 412 (1978).

216. *See Newman*, 390 U.S. at 402.

217. *Christiansburg Garment Co.*, 434 U.S. at 421.

218. S. Rep. No. 94-1011, at 4–5, *reprinted in* 1976 U.S.C.C.A.N. at 5912 (explaining the intent behind the Civil Rights Attorney's Fees Awards Act of 1976); *see also* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 108–11 (1991) (Stevens, J., dissenting) (summarizing legislative history).

219. *See, e.g.*, *Newman*, 390 U.S. at 402; Brand, *supra* note 212, at 309–10.

220. *See, e.g.*, Marek v. Chesny, 473 U.S. 1, app. at 43–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions).

221. *See infra* notes 286–93 and accompanying text.

compensatory damages awarded to successful plaintiffs, but instead Congress provided an award for the lawyers who take those cases. Congress determined that parties would be unable to assess the merits of their cases or litigate them effectively without representation.[222] Particularly given the absence of a civil *Gideon*, fee-shifting statutes represent a strong statement as to which lawyering activities serve the public interest.

III. COMPARING THREE APPROACHES

The previous section surveyed three very different institutional contexts in which public interest lawyering is operationalized: tax exemptions, exceptions to the solicitation prohibition, and fee-shifting statutes. This section will compare and analyze the definitions constructed in the three contexts.

A. Fee-Shifting Legislation as a Counter-Example

In its solicitation jurisprudence, the Supreme Court has drawn a distinction between litigation aimed at public purposes and litigation motivated by pecuniary gain.[223] The Court has recognized public interest litigation, in contrast to commercial lawyering, as an extension of political expression entitled to the highest level of First Amendment protection. In the companion cases of *In re Primus* and *Ohralik v. Ohio State Bar Ass'n*, the Court protected the solicitation of an attorney volunteering with the ACLU on a potential substantive due process case, while upholding censure of an attorney who engaged in solicitation of personal injury cases for a contingency fee.[224] In addition to the substantive differences distinguishing the underlying litigation, the majority opinion in each case devoted significant attention to the role of the soliciting attorneys' pecuniary gain. Particularly in *Ohralik*, although the concurrence pointed out that Mr. Ohralik had, in fact, provided accurate and potentially useful legal advice, the majority failed to consider seriously the extent to which Mr. Ohralik's lawyering activities served a public purpose.[225] The majority determined that the attorney's motives were pecuniary in nature and resolved the case on that basis.[226] This binary approach has since dominated solicitation doctrine jurisprudence[227] and shaped the

222. S. REP. NO. 94-1011, at 3–4, 6, *reprinted in* 1976 U.S.C.C.A.N. at 5910–11, 5913. Congress wanted to attract counsel who could handle sophisticated cases and recognized that fees needed be set accordingly. *See id.* at 6 (fees should be set at an amount that would "attract competent counsel").

223. *See supra* Part II.B.

224. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 447–48 (1978); *In re* Primus, 436 U.S. 412, 412–13 (1978). For literature on the class-based elements of anti-solicitation rules, particularly as applied to personal injury lawyers, see Pearce, *supra* note 55, at 396–97.

225. *Ohralik*, 436 U.S. at 473–74 (Marshall, J., concurring).

226. *See id.* at 467 (majority opinion).

227. Note that there has been some ambivalence on the Court. In one of its advertising cases, the Court noted that law is no less a profession because lawyers "earn their livelihood at the bar."

public interest exception to the Model Rule, which bars solicitation of employment "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[228]

The IRS recognizes a broad category of lawyering as public interest work deserving of tax benefits.[229] Treasury Regulations specify that to qualify, the lawyering work must serve a public rather than private interest.[230] One form of activity that tax law recognizes is legal services for indigent clients, provided at a reduced fee based on the indigent clients' ability to pay, rather than at a market rate based on the type of service. This category qualifies because it is considered a form of charity to the poor, which necessarily serves the public, as opposed to a private interest.[231] The IRS has interpreted public interest lawyering deserving of tax benefits to include organizations that defend human or civil rights, even if their clients are not indigent persons.[232] To qualify for tax exemption, a human or civil rights organization must comply with the asset restrictions of Section 501(c)(3) of the Internal Revenue Code.[233] The IRS will also engage in special scrutiny of whether a human or civil rights organization engaged in litigation serves a public, as opposed to private, interest. If client fees provide a primary form of financial support for the organization, that fact can indicate that the organization services a private rather than public purpose.[234] Finally, another form of activity that the tax law recognizes is that of a "public interest law firm" (PILF) that complies with the particular requirements of Revenue Procedure 92-59.[235] In that case, even if a law firm neither serves indigent clients nor defends human or civil rights, the IRS may recognize the law firm as engaged in a unique category of public interest law if it serves the "public rather than a private interest" and handles "issues of significant public interest."[236] To distinguish these PILF cases from "traditional private law," the IRS has issued guidelines restricting the finances of PILF firms.[237] Although such cases may generate attorneys' fees, to qualify as "public interest law" for tax exemption purposes,[238] the fee for those cases must be severely limited.[239] Most importantly, the fee must be small enough to make the case "not . . . economically feasible for the traditional private law firms," and the fees must add up to less than fifty percent of the

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Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977). Perhaps there is acceptance of the notion that the profession must earn a living, but public interest work is still held out as special.

228. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2012).
229. *See supra* Part II.A.
230. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008).
231. Rev. Rul. 69-161, 1969-1 C.B. 149.
232. Treas. Reg. § 1.501(c)(3)-1(d)(2); Rev. Rul. 73-285, 1973-2 C.B. 174.
233. Treas. Reg. § 1.501(c)(3)-1(b)(4).
234. *Id.* § 1.501(c)(3)-1(d)(1)(ii).
235. Rev. Proc. 92-59, 1992-2 C.B. 411.
236. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 § 3(01).
237. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 §§ 3–5.
238. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 § 4.
239. Rev. Proc. 92-59 § 4(03)–(05).

overall costs of operating the lawyer's firm.[240] In all three of these areas recognized for tax benefits—legal aid to the poor, defending human and civil rights, and public interest law more broadly conceived—the IRS tethers its definition of the category of public interest law to the economics of the legal services. In the first category, the economics of the client population are the defining factor. In the remaining two, the work is demarcated by exceptional fee structures and market conditions.

Fee-shifting statutes stand in stark contrast to the approaches to public interest lawyering taken in the contexts of tax benefits and solicitation. Although Congress has not expressly crafted one statute defining all public interest litigation in which fee shifting is to be available, in a series of subject-specific laws, it has carved out a major exception to the traditional American rule regarding the availability of civil counsel, and legislative history makes clear that the purpose of this exception is to encourage litigation in the public interest.[241] The subjects of this public interest litigation have historically focused on civil rights but, for the past half century, they have expanded into other areas including labor, consumer protection, securities, the environment, and public access to government records.[242]

There are two key differences between the concept of public interest lawyering as expressed in fee-shifting statutes, on the one hand, and in solicitation rules and tax exemptions, on the other. First, fee-shifting statutes define public interest lawyering based on the substance of the work. This definition does not depend primarily on the unavailability of representation in the current legal services market. Rather, because the lawyering addresses topics of particular public interest, the statutes seek to facilitate it within, and build on, the existing economic market. This is not to say that the creation of fee-shifting statutes is unrelated to market conditions and market failures. The fee-shifting provisions would not be necessary if all potential plaintiffs with claims had both the means and the incentives to pay market-rate attorneys' fees.[243] Yet what is notable is that the definition of which kind of lawyering work is worth supporting

240. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 §§ 2(02), 4(04)–(05).

241. *See supra* Part II.C.

242. Although the collection of statutes carrying such provisions may be recognizable as public laws, as a historical matter, the group does not necessarily reflect one unified scheme for public interest lawyering so much as the priorities of legislators at various times in U.S. history.

243. Although the statutes were passed with the assumption that potential litigants could not afford to pay attorneys' fees, not all fee-shifting statutes were based on evidence of that empirical reality. Moreover, some of the statutes aim to remedy social problems that even wealthy individuals or a collection of such individuals would not have sufficient economic incentive to pursue. Even to assess whether potential clients could afford the litigation in the current market makes little sense, where the case is too expensive for anyone's private interests to make it worthwhile and yet it is highly worthwhile given the larger public interest. *See, e.g.*, Chapin, *supra* note 117, at 442–43 (characterizing PILF cases as those on behalf of a non-indigent majority lacking economic incentive to sue).

is a positive one, based on the substance of the cases, as opposed to a negative one, based on the market's devaluation of the work.[244]

There is a second unique attribute of the fee-shifting statutes as a definition of public interest lawyering. Unlike solicitation jurisprudence, which focuses on pecuniary motives, and tax law, which distinguishes between organizational purposes, fee-shifting provisions do not consider good intentions. Fee-shifting statutes recognize and reward only that activity which, through a court order or settlement, brings results. Under the Model Rule and jurisprudence on which it is based, public interest lawyering without pecuniary intent will be granted an automatic exception to the general prohibition on solicitation.[245] It does not matter whether or not that lawyer accomplishes anything for a client. The same is true for public interest lawyering under federal tax law. A non-profit law firm will enjoy tax benefits so long as it complies with federal tax law requirements, regardless of the actual utility of the services it offers. Yet, to enjoy the benefits of fee-shifting provisions, a lawyer must not only engage in work whose subject matter is defined by statute, but she must prevail.[246] She must not only intend to do good, but also she must actually accomplish something for her clients.[247]

B. Solicitation Rules and Tax-Exempt Non-Profits

The rationale behind the solicitation prohibition might lend itself to a public interest exception defined by pecuniary motive. Bar associations and courts have advanced a number of slightly different rationales for the general rule. These rationales can be divided into three categories.

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244. The financial means of the clients is not totally irrelevant, because if the clients could afford to pay lawyers out of pocket, arguably the fee-shifting statutes would not be necessary. But the reason for the fee-shifting statutes goes beyond obtaining lawyers for individual clients without means to pay; it stems from a sense that the litigation serves a larger public purpose. It serves to enforce laws whose public policies are of particular value and to deter bad actors who would violate those laws in the future. The fee-shifting provisions serve not only to assist the individual with securing access to legal services but, even more, to promote certain kinds of lawyering in the public interest. Unlike in legal services, the class status of the clients is not among the key factors in determining whether the representation should be provided as a form of public service lawyering. On the contrary, the class status of the clients varies widely across fee-shifting statutes, from securities cases to consumer cases to employment discrimination cases, many of which involve persons of means but without sufficient economic incentives to engage a lawyer's services, given the likely damages. But, again, a major purpose of these statutes and the enforcement of them is deterrence, and, for that, the class status of the individual plaintiffs is irrelevant.

245. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2012); *see also infra* notes 248–56 and accompanying text.

246. The fee-shifting approach also carries special vulnerabilities and challenges. *See infra* Part IV.

247. It should be noted that some critics believe the lawyer can obtain fees even if the result offers relatively little value for her client. *Compare* Evans v. Jeff D., 475 U.S. 717, 734–35 (1986) (describing relatively high fees despite relatively low monetary damages), *with* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1117–18 (2012) (describing image of overpaid lawyers as inaccurate). Yet, in theory, successful litigation pursuant to a fee-shifting statute benefits not only the individual client, but also the public at large, *see Evans*, 475 U.S. at 752 (Brennan, J., dissenting), so the estimated value of the legal services should incorporate the broader benefit.

First, solicitation of clients for the lawyer's own employment arguably creates an inherent conflict of interest.[248] When a lawyer communicates with a layperson about the viability of any potential claims or defenses, and the prudence of retaining counsel, the person looks to the lawyer for advice. However, when that lawyer hopes to enter into a retainer with a client, the lawyer cannot provide unbiased advice.

Second, solicitation could result in a retainer when the client does not truly want representation. This is the greatest risk in the case of coercion or fraud by the attorney. Even in the absence of behavior that qualifies as fraud or coercion, courts have issued warnings about the consequences of lawyers, "trained in the art of persuasion," interacting with laypersons.[249]

Third, solicitation could result in a retainer where the client does not need, or would not benefit from, representation. Like the second rationale, this is a concern where the attorney engages in fraud or coercion, or the layperson is fragile or incapable of assessing her own interests. But the concern here is substantive: preventing solicitation where entering into the retainer is not in the person's best interests.[250]

To the extent that solicitation prohibitions aim to avoid conflicted or otherwise bad behavior by attorneys, it could seem that a public interest exception based on pecuniary motives makes sense. One rationale for the pecuniary motive limitation is the idea that a lawyer with a pecuniary motive will necessarily have a conflict of interest when advising a potential client, because of the lawyer's desire to enter into the retainer and

248. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 461 n.19 (1978); *see also* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 1–3 (2012).

249. *Ohralik*, 436 U.S. at 464–66; *see also* Alexander v. Cahill, 598 F.3d 79, 96–103 (2d Cir. 2010) (upholding moratorium on post-accident targeted solicitation regardless of actual fraud or coercion); MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 2–3 (2012). Regulators and courts generally view in-person solicitation as particularly likely to risk harm to potential clients. Compared with recordings, mailings, and general advertisements, in-person solicitation may allow less time for a layperson to make a decision about entering into a retainer, and she may feel pressured by the presence of an attorney while deciding. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 2–3 (2012). In *Ohralik*, the Court suggested that in-person solicitation presents special dangers of pressuring potential clients to respond quickly and affirmatively to offers of representation, which might be easier to ignore if presented in printed form. *Ohralik*, 436 U.S. at 457. Additionally, in-person communications may be the most difficult to monitor and to challenge. The content of a written or recorded form of solicitation can more easily be established. Finally, as courts and regulators have loosened restrictions on advertising and non-live forms of solicitation, these alternative avenues of communication may be cited to show a decreased need for in-person solicitation and therefore decreased acceptance of the risks in-person solicitation entails.

250. Another, less emphasized, concern may be that retainers entered into under conditions of in-person solicitation are particularly likely to be gateways to other substantive problems, such as the provision of substandard services. One might believe that in-person solicitation agreements tend to be formed between unscrupulous lawyers and particularly vulnerable populations that lack recourse if the lawyer fails to perform well. If that were the case, regulators might determine that the regulation of the quality of services is too expensive and too intrusive to pursue as thoroughly as would be necessary to stamp out all such incidents of inadequate legal representation, but stopping the formation of such relationships before they occur is a productive approach.

earn a fee.[251] If the lawyer bears no financial incentive to convince the target of the solicitation to become a client, the conflict might disappear.[252]

Lawyers motivated by pecuniary gain might also be more likely to engage in the types of abusive practices that solicitation restrictions are designed to prevent. Comment 5 to the Model Rule says exactly this: "There is far less likelihood that a lawyer would engage in abusive practices . . . in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain."[253] The drafters of the comment posit that if an attorney's primary motivation is something other than profit, she will be less likely to behave badly.[254] They suggest that pecuniary gain is the bad motive most likely to cloud a lawyer's judgment.[255] The construction of this rule reflects a progressive idea that, so long as an expert was removed from economic interest, "his commitment to the common good [would be] pure and incorruptible."[256]

Yet, following this logic, the pecuniary motive approach to the public interest exception can be both overinclusive and underinclusive. The exception may be too broad, permitting solicitation in situations where the absence of pecuniary gain does not provide a sufficient guarantee of good behavior. Monetary greed is not the only motivator that can lead to bad behavior or conflicts of interest. Take the case of Ms. Primus: while she might have wanted to help the women she met, she also wanted to participate in crafting litigation to challenge the imposition of sterilization requirements. This might be a motivation separate from pecuniary gain, and it might benefit the public at large, but it could be different from the needs of the potential clients. Scholars have previously written about the conflicts public interest lawyers may face when representing a cause and not just a client.[257] While the lawyer may have multiple goals and the majority of those may be pure in the sense of not being monetarily self-interested, this does not necessarily safeguard the goodness of the solicitation with respect to potential conflicts.

If the goal of the public interest exception is to make room for solicitation that serves the public interest, the pecuniary gain exception is also potentially too narrow.[258] First, an attorney could possess mixed motives, seeking to promote the public interest and to earn a living. Her motives could change over time; for example, an attorney might come to believe

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251. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 2, 5 (2012).
252. *Id.* at cmt. 5.
253. *Id.*
254. *Id.*
255. *See id.*
256. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1467 (1996); *see* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 144 & n.162 (2002).
257. *See* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 548, 555 (2004).
258. *See* Hill, *supra* note 136, at 393–94.

strongly in the public value of a case that she previously accepted only for monetary reasons. As Carrie Menkel-Meadow has discussed with respect to cause lawyers, parsing or quantifying motives may be impossible.[259] Second, and perhaps more importantly, an actor's conduct may be good or bad regardless of intent.[260] The lawyer might have pecuniary or other "bad" motives and the legal services could still be good.[261] The reverse is also true. In both cases, the motive of the attorney can be unrelated to whether the solicitation serves the public interest.

Aside from the specific rationales behind the solicitation rules, the other factor influencing the solicitation doctrine is the role of the First Amendment. The solicitation cases may have framed public interest in opposition to pecuniary motives due to what the Court perceived as a dichotomy between political and commercial forms of speech. The Court framed *Primus* and *Ohralik* as follows:

> Unlike the situation in *Ohralik*, however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether, in light of the values protected by the First and Fourteenth Amendments, these differences materially affect the scope of state regulation of the conduct of lawyers.[262]

The status of the commercial speech doctrine at the time of the decisions may partly explain this approach.[263] It was shortly before the de-

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259. *See* Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING, *supra* note 10, at 31, 37–48.

260. A separate question, beyond the scope of this paper, is whether bad acts may be justified if they serve a greater good. In the case of an attorney engaged in solicitation, the solicitation might be conducted poorly, even coercively, for the purpose of serving a greater good. If an individual plaintiff were enlisted by the NAACP LDF under circumstances we might view as pressured, but the organization represented her zealously and it won both a judgment for her and a victory for racial equality, we might have different views as to whether this solicitation should be punished.

261. *See, e.g.*, Maracich v. Spears, 133 S. Ct. 2191, 2212–13 (2013) (Ginsburg, J., dissenting) (noting that lawyers were prohibited from using the Freedom of Information Act to obtain public information to locate additional plaintiffs for ongoing suit, even though statute allows provision of information for litigation or "investigation in anticipation of litigation" (internal quotation marks omitted)); *see also infra* notes 304–08 and accompanying text (describing important public interest served by some lawyering by large, conventional law firms).

262. *In re* Primus, 436 U.S. 412, 422 (1978).

263. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 622–24, 635 (1995) (interpreting attorney advertisements as commercial speech subject to intermediate scrutiny pursuant to *Central Hudson* and holding that restriction on targeted mail advertisements withstood intermediate scrutiny); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–66 (1980) (identifying

cisions of *Primus* and *Ohralik* that the Court issued *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[264] recognizing limited First Amendment protection for commercial speech.[265] In *Ohralik*, the Court explained that commercial speech merits only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . allowing modes of regulation that might be impermissible in the realm of noncommercial expression."[266] The Court has since broadened the protections for commercial speech, but the notion has persisted that public interest lawyering is disconnected from the commercial market.[267] The drafters of the Model Rules continue to use the absence of a significant pecuniary motive as the key indicator of public interest lawyering excluded from the solicitation prohibition.[268]

Lawyers employed by non-profit organizations are understood to be exempted from solicitation prohibitions, though Supreme Court jurisprudence does not require the exemption to reach so broadly.[269] Comment 5 to the Model Rule explains that the solicitation prohibition "is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations."[270] Courts tend to view solicitation by non-profits as excluded under a blanket rule, without separate analyses of the attorneys' motivations or whether the activity is entitled to constitutional protection.[271] Although the structure of a non-profit means the lawyer will not receive a profit directly from the case, should litigation lead to fees pursuant to a fee-

test for commercial speech); *see also* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 473–77, 479–80 (1988) (striking down restriction on targeted mailings); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647, 649 (1985) (reversing discipline against attorney for truthful and not misleading statements in advertising).

264. 425 U.S. 748 (1976).

265. *Id.* at 770.

266. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

267. The Court specifically applied First Amendment protections to attorney advertising in *Bates v. State Bar of Arizona*, "holding that advertising by attorneys may not be subjected to blanket suppression . . . [but] not . . . that advertising by attorneys may not be regulated in any way." 433 U.S. 350, 383 (1977). It encouraged the bar to "assur[e] that advertising by attorneys flows both freely and cleanly." *Id.* at 384.

268. *See supra* Part II.B. The drafters of the Model Rules are of course free to recognize and exempt a category of public interest lawyering broader than the category of public interest lawyering determined to be constitutionally protected.

269. *Compare* Rivera v. Brickman Grp., Ltd., No. 05-1518, 2006 U.S. Dist. LEXIS 10210, at *5–6 (E.D. Pa. Mar. 10, 2006) (finding that, given non-profit status of law firm, there was no evidence that plaintiffs' counsel was motivated by pecuniary gain, even though attorneys sought fees provided by statute), *with* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1215 n.5 (8th Cir. 1984), *abrogated on other grounds by* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989) (distinguishing employment case in which class was represented by "a private attorney who is requesting a court-awarded fee" from *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), where class was represented by the NAACP LDF, a "nonprofit organization formed to litigate civil-rights cases").

270. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 5 (2012).

271. *See, e.g.*, *Rivera*, 2006 U.S. Dist. LEXIS 10210, at *5–6 ("If, like most non-profit organizations, plaintiffs' counsel's employer uses income to fund more projects rather than supplement the salaries of its employees, one can expect plaintiffs' counsel to receive no pecuniary gain whatsoever from their efforts in this litigation.").

shifting statute, the fees could increase the size of the organization's war chest or even determine its overall financial health. Additionally, since attorneys' careers can crisscross between for-profit firms, government agencies, and non-profit organizations, an individual attorney could have a pecuniary motive in pursuing a case in any one of these settings. If a case might increase the lawyer's legal skill or reputation, it could very well lead, albeit indirectly, to pecuniary gain down the road.[272]

Putting aside motives, it still is not obvious why solicitation for every kind of case handled by a charitable legal-services organization would be constitutionally protected. The Supreme Court's jurisprudence indicated that solicitation for law reform cases involved rights of free expression and association,[273] but the First Amendment might not protect run-of-the-mill legal services cases. Explaining the special democratic role of the litigation on behalf of minorities,[274] the Court emphasized that the NAACP did not take on "ordinary damages actions [or] criminal actions in which the defendant raises no question of possible racial discrimination."[275] In *Primus*, the Court highlighted that "the ACLU has only entered cases in which substantial civil liberties questions are involved."[276] It is not clear that the Court intended for solicitation of all charitable legal organizations to be constitutionally protected.[277]

Why, then, is all non-profit lawyering treated as exempt from solicitation rules? Most likely, bar associations and courts view charitable organizations as providing access to legal services for low-income populations, and they recognize solicitation as a means of improving that access. This access-based definition of public interest lawyering recognizes an exception to the regulation for lawyering that serves otherwise neglected segments of society. The approach of the American Bar Association, in facilitating solicitation by non-profits, offers special regulatory privileges for legal services that compensate for market failures, just as the Court's solicitation jurisprudence reflected special appreciation for legal services that compensate for failures of the political system.

The access-based approach to public interest lawyering stands in contrast to the approach implicit in fee-shifting statutes. Such laws incorporate substantive decisions as to which cases serve the public, and implement those decisions by making use of market mechanisms. Unlike actors that identify public interest lawyering as lawyering in absence of

272. *See* Menkel-Meadow, *supra* note 259, at 41.

273. *See generally* Sabbeth, *supra* note 193 (analyzing theory of political expression suggested in solicitation cases).

274. The Court emphasized that litigation expressing the views of minorities and minority interests has special importance in a political system where such views might not find other avenues of expression. *See* NAACP v. Button, 371 U.S. 415, 430–31 (1963).

275. *Button*, 371 U.S. at 420.

276. *In re* Primus, 436 U.S. 412, 427 (1978) (quoting *In re* Smith, 233 S.E.2d 301, 303 (S.C. 1977), *rev'd*, *Primus*, 436 U.S. 412) (internal quotation marks omitted).

277. *See generally id.*; *Button*, 371 U.S. 415.

profit or fees, Congress has, in fee-shifting statutes, identified substantive categories of public interest lawyering, and implemented measures to make it profitable precisely because of its public value.

C. Tax Benefits and Fee Shifting

Both fee-shifting statutes and tax law involve private actors supporting public interest lawyering, yet they do so in different ways. Fee-shifting statutes encourage public interest litigation and put the cost on the bad actors whose behavior creates the need for it. The legislature defines which litigation is in the public interest and mandates that bad actors pay the costs of the litigation brought against them. Tax benefits, on the other hand, serve as a financial subsidy from the federal government to private actors, who in turn provide a service in the public interest. An important critique of relying on the non-profit sector is the unaccountability of the private provider.[278] The tax benefit model allows unelected, wealthy funders of the non-profits to define the public interest and set the priorities for funding. In contrast, in fee-shifting statutes, the federal government maintains responsibility for setting priorities and defining the public interest.

In fee-shifting statutes, Congress makes a substantive determination that certain lawyering activity is in the public interest, while, in the context of tax benefits, the IRS defines public interest lawyering based primarily on finances and leaves the substantive decisions to the donors. An organization may qualify as a charity for tax purposes based on the finances of the client population, in the case of legal aid organizations serving the indigent, or asset restrictions and fee restrictions in the case of civil and human rights organizations or PILFs. The IRS does maintain some control over what counts as public interest lawyering by defining the public purposes that qualify an organization for 501(c)(3) status, but those purposes have been so broadly interpreted that it is difficult to identify a clear set of priorities. Moreover, the IRS has specified that, in the case of the PILF, it is the fee restrictions that distinguish it.[279] Although the definition of charitable purposes necessarily reflects some value judgments,[280] the federal government has attempted to create the

278. *See* Garry W. Jenkins, *Nongovernmental Organizations and the Forces Against Them: Lessons of the Anti-NGO Movement*, 37 BROOK. J. INT'L L. 459, 510 (2012) ("The notion that nonprofits need to improve their levels of accountability is conventional wisdom among students of civil society and philanthropy."); Weissman, *supra* note 69, at 803 ("Philanthropies engage in the social issues of their choosing, without accountability to political processes, yet often perform government functions and influence state power."); Penina Kessler Lieber, *1601–2001: An Anniversary of Note*, 62 U. PITT. L. REV. 731, 736 (2001) (describing "unbridled power and potential for abuse" of private foundations).

279. *See* Rev. Proc. 92-59, 1992-2 C.B. 411.

280. *See, e.g.*, Cammarano v. United States, 358 U.S. 498, 533 (1959); Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930); *see also* Resnik, *supra* note 29, at 2128–29 (describing how judges have attempted to rely on market indicators of the value of lawyers' work to avoid making their own assessments of the utility of certain forms of litigation, but arguing that, in issuing opinions on fees,

appearance of neutrality[281] while recognizing activities worthy of tax benefits.

The key theoretical bases for granting tax benefits to charitable organizations and their donors can be summarized in three categories: (1) charitable donations relieve pressure on the government by offering services that the government would otherwise be obligated to provide or could face political costs for failure to provide, such as shelter for the homeless;[282] (2) charity creates positive externalities beyond redistribution of resources or the provision of services, such as encouraging civic engagement and educating the public on policy matters;[283] and (3) taxing charities may be practically impossible.[284]

In the case of non-profits engaged in public interest lawyering, tax benefits allow the government to support private actors engaged in activities that the government could not engage in directly. For example, through tax benefits, the federal government facilitates the work of the ACLU or the NAACP LDF, and much of that work is to challenge government action. Of course the government could not actually appear in litigation as its own adversary, but through the tax benefits, the govern-

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judges do in fact make value judgments, and it is "irresponsible not to talk openly about how judges should spend money in pursuit of social goals achieved through litigation").

281. The political neutrality of the federal government is questionable. Critics on the right would point to recent audits of Tea Party organizations, while critics on the left have described historical persecution of the NAACP and other progressive organizations. *See, e.g.*, CHEN & CUMMINGS, *supra* note 10, at 36.

282. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008) (defining charitable organizations as organizations that "lessen[] . . . the burdens of [g]overnment"); *see also* McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972) ("The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the [g]overnment relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the [g]overnment"). One theoretical justification for granting tax benefits to non-profits is that to offer the tax benefits costs less than to provide the services directly. *See* Paul Valentine, *A Lay Word for a Legal Term: How the Popular Definition of Charity Has Muddled the Perception of the Charitable Deduction*, 89 NEB. L. REV. 997, 1009–10 (2011); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 590 (1983) ("The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the [g]overnment is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." (quoting H.R. REP. NO. 75-1860, at 19 (1938)) (internal quotation marks omitted)).

283. *See* Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 610 (2011); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430 (1998); Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 404–05 (1998) (discussing the view that tax deductions give donors the ability to influence government support).

284. Some of the most common practical objections to taxing non-profits are: taxes could threaten the viability of non-profit organizations, while generating relatively little income for public coffers; identifying taxable income of non-profits creates definitional puzzles; and exemptions for religious non-profits are needed to preserve the separation of church and state. Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 64–65 (2012); Robert Christopherson & James J. Coffey, *Hedging Property Taxes for Exempt Organizations*, 34 TAX'N EXEMPTS 39, 40–42 (2012). *See generally* Diane L. Fahey, *Taxing Non-profits out of Business*, 62 WASH. & LEE L. REV. 547 (2005).

ment helps to fund its own opposition. The rationale for doing so is, at least in part, the public interest in a vibrant, democratic dialogue.[285]

The rationale for fee-shifting statutes is similar to that of tax benefits for non-profits in that it creates an incentive for private actors to engage in public interest lawyering that exceeds what the government can afford to fund. As the Senate Report concerning the Civil Rights Attorney's Fee Awards Act of 1976 (CAFAA or the Fee Act)[286] indicated, "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[287] The legislature designed fee-shifting statutes to support the "private attorney general"[288] who enforces public policy.[289]

One difference between the public interest lawyering supported by fee-shifting statutes and that supported by tax benefits is that the former serves as a deterrent to the behavior of identified bad actors, while the latter provides a universal open invitation to do good. The Senate Report for CAFAA highlighted not only representation of victims of civil rights violations, but also prosecution of the violators: "If private citizens are to be able to assert their civil rights, and *if those who violate the Nation[]'s fundamental laws are not to proceed with impunity*, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."[290] The fee-shifting statutes function not only as carrots but also as sticks; they encourage public interest lawyering, but also mandate that bad actors will be required to cover the costs of it when necessary to bring them into compliance with the law. Tax law portrays public interest lawyering as a politically neutral activity, to be funded by private parties inclined by generosity. Fee-shifting statutes, in contrast, elevate public interest lawyering to an essential activity, whose funding, though covered by private actors, is mandatory.[291]

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285. *See* Sabbeth, *supra* note 193, at 1499–502, 1530–31 (discussing importance of dissent).

286. 42 U.S.C. § 1988(b) (2012). The Civil Rights Attorney's Fee Awards Act of 1976 was one of the first of the modern statutory provisions, and most other provisions use it as a model.

287. S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (1976).

288. *Id.* at 3 (internal quotation marks omitted); *see* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2133–37 (2004) (describing the growth of the concept of the private attorney general).

289. S. REP. NO. 94-1011, at 3, *reprinted in* 1976 U.S.C.C.A.N. Notably, the Senate Report described civil rights victims, the potential plaintiffs, as private attorney generals, but their lawyers are the better private analogue to the attorney general, and, as is discussed in Part II.C of this Article, it is clear that it is the lawyers at whom the legislation was aimed.

290. *Id.* at 2 (emphasis added).

291. Of course, to the extent the tax benefits support litigation, there is a less explicit adversary. For example, if there were no subsidy for the ACLU, that would weaken, if not destroy, the ACLU, and violators of the constitutional rights defended by the ACLU might be able to more freely engage in unconstitutional behavior in the absence of any lawyers to challenge their acts. The same is true for legal aid organizations that, for example, represent poor tenants and make it harder for private or public landlords to violate housing laws.

A second difference between the incentives in fee-shifting statutes and tax benefits is worth noting. Fee-shifting is tied to prevailing in individual cases, while tax subsidies are based on an organization's overall activities. Tax law recognizes charitable organizations engaged in non-litigation activities and imposes special restrictions on charities engaged in litigation. Fee shifting, in contrast, is available only for litigation and, as discussed above, only that in which one prevails.[292]

Both of these contexts reflect fundamental conceptions of what public interest lawyering is and should be. Tax law depicts public interest lawyering as an individual choice, a voluntary act of charity and good will. Fee-shifting statutes, on the other hand, embrace a vision of public interest lawyering grounded in democratically defined values and a social mandate to enforce them.[293]

IV. COMPLICATING THE DIVISION BETWEEN PUBLIC INTEREST LAWYERING AND PROFIT

The ambiguity about where financial gain fits in the definition of public interest lawyering may reflect a broader ambivalence about the identity of the legal profession. We may be confused or conflicted about how earning an income fits with the view of ourselves as enlightened professionals serving the public. If all lawyering helps to ensure that social problems are resolved within the rule of law and all lawyering protects the interests of some members of the public, then perhaps all lawyering is in the public interest. Yet we tend to believe that there is a subset of lawyering activity for which the term public interest lawyering is reserved. The term is typically used as shorthand for volunteer activities outside of a lawyer's regular practice or the activities of a small subset of lawyers who have selflessly committed themselves, at least temporarily, to a life different from the mainstream of practice; in many cases, they have taken vows of relative poverty and sacrificed the usual rewards of the profession. Yet this approach is both descriptively incomplete and potentially dangerous.

When legal actors are in the position to make choices about regulation, funding, or less tangible forms of support, they ought not to mistake undercompensation for the only indicia of public interest lawyering. Rather, they must engage in constructing a substantive definition fitting the specific institutional context and the legal actors' priorities. There are

292. *See supra* Part III.A.

293. Fee-shifting statutes do not require government expenditures (unless a government entity is liable as a defendant), but tax benefits cost the federal government millions of dollars per year. *See* S. REP. NO. 94-1011, at 3–4, *reprinted in* 1976 U.S.C.C.A.N. (highlighting the advantage of fee-shifting, rather than the creation of more government "bureaucracy" for enforcement, in terms of both revenue and political philosophy). Tax laws reflect value judgments, but they also maintain the appearance of substantive neutrality. Perhaps it would be difficult to make a substantive judgment, like that in the fee-shifting statutes, in combination with a significant allocation of resources, like that in the tax laws, without generating significant controversy.

two reasons why this is important. First, there are lawyering activities that serve important public functions, regardless of whether they generate income. Second, to the extent that there are public values worth protecting, it is critical that protection efforts are strong and financially independent. Otherwise, lawyering against economically or politically powerful actors may be too easily thwarted.

A. Public Interest Lawyering in For-Profit Settings

Empirical research complicates the dichotomized portrait of public interest lawyering and profit-generating practice.[294] Since the days of *Button* and *Primus*, attorneys motivated by political commitments have increasingly crafted careers not only as staff attorneys at impact-litigation funds and legal aid offices, but also as partners, associates, and solo practitioners at private, profit-generating firms. Though all of these lawyers share an abiding commitment to the pursuit of law as a public profession, the form they choose varies widely, as do their explanations of their choices. Some lawyers are candid about seeking higher salaries, admitting that the romance of public interest lawyering proved insufficient to sustain them while sending children to college, yet others choose alternative, for-profit structures as integral to their public interest goals.[295] Those choices reflect diversifying definitions of public interest practice.[296]

To some degree, the development of for-profit, fee-based structures represents an increasingly pluralist approach to the delivery of services.[297] One might charge low-income clients a fee on the view that paying even a small sum encourages clients to be more active in their cases and take ownership of the process by which they participate in the legal system. For low-income clients, paying a small fee can increase their agency and improve their relationships with their lawyers. By paying, clients may be in a better position to make demands of their lawyers, shifting the paradigm away from the traditional power dynamics between public interest lawyers and their indebted non-paying clients. In this way, the presence of the fee, rather than the absence of the fee, contributes to the public interest nature of the lawyering.[298]

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294. *See* Ann Southworth, *What Is Public Interest Law? Empirical Perspectives on an Old Question* (Univ. of Cal., Irvine Sch. of Law, Legal Studies Research Paper Series No. 2013-106, 2013), *available at* http://ssrn.com/abstract=2256719.

295. *See* Trubek, *supra* note 12, at 429–32; Trubek & Kransberger, *supra* note 10, at 202–03.

296. *See* Cummings, *supra* note 14, at 9–11; Scott L. Cummings, *What Good Are Lawyers?*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 1, 4–10 (Scott L. Cummings ed., 2011).

297. Until 1992, non-profit, tax-exempt legal services organizations were not permitted to accept fees from clients. Rev. Proc. 92-59, 1992-2 C.B. 411 § 2(05)–(06); *see also* COUNCIL FOR PUB. INTEREST LAW, *supra* note 26, at 306–11 (describing IRS restrictions on client-based fees for public interest law centers and the Council's recommendation to relax the restrictions).

298. *See* Trubek & Kransberger, *supra* note 10, at 209.

Another area of developing for-profit practice has been firms serving particular demographic groups. As the Supreme Court noted in *Button*, the NAACP LDF at that time did not handle "ordinary" litigation, only cases where the substance of the claims or defenses related to racial justice. Some lawyers, however, view the provision of legal services to particular client populations as a vital form of public interest lawyering, regardless of the substance of the individual cases.[299] If a lawyer wants to dedicate herself to racial justice, the NAACP LDF may offer the best opportunities, and, similarly, if she wants to work for women's rights, then Legal Momentum (formerly NOW LDF) is an excellent forum. Yet, if one believes in increasing the relative power of certain segments of the population, a small, for-profit organization may provide the means to do it. As with the acceptance of a fee, the for-profit firm may provide an important avenue for democratic, public interest lawyering.[300]

Beyond using profit structures to more freely pursue empowerment for a client population, the pursuit of economic power can itself be understood as a function of public interest lawyering.

B. Economic Strength and Independence

Certain categories of public interest lawyering require economic strength and independence. In particular, fact-intensive civil litigation requires significant resources, and challenging powerful corporate interests requires independence from those interests. Non-profit organizations and volunteer services of conventional lawyers both contribute valuable legal services that increase access for clients unable to afford representation, but each carries its own limitations due to its economically devalued and dependent position in the legal market.[301]

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299. Trubek, *supra* note 12, at 418; *see* Trubek & Kransberger, *supra* note 10, at 207–08.

300. *See* Trubek & Kransberger, *supra* note 10, at 208–09.

301. The fee-shifting model of public interest lawyering also carries special vulnerabilities and challenges, and the Supreme Court has not offered consistent support. First, the Supreme Court ruled in *Buckhannon* that serving as a catalyst for change in a defendant's behavior is not sufficient to prevail and be entitled to fees; rather, an attorney must obtain a judgment against the defendant. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 600, 610 (2001). This means that an attorney can consult with a client regarding violation of an important public policy, reach out to the bad actor to request that it cease its unlawful conduct, draft and file a complaint, litigate a case through discovery and up through trial, and then, if a defendant "chooses" to change its conduct, the attorney representing the plaintiff will receive no fees. This seems odd given the public interest in ensuring compliance with public policy and the lawyer's role in forcing the defendant to comply. It makes taking on these public interest cases much riskier for attorneys representing clients not paying out of pocket. Catherine Albiston and Laura Beth Nielsen have demonstrated that the financial impact of the *Buckhannon* decision has in fact curtailed public interest lawyers' activity. *See* Albiston & Nielsen, *supra* note 212, at 1120–21.

Another challenge of the fee-shifting model of public interest lawyering is that civil litigation increasingly ends in settlement and defendants can condition settlements on the sacrifice of payment for plaintiffs' lawyers. If such an offer otherwise satisfies a plaintiff's interests, it can be difficult to refuse. Yet in the aggregate, these sacrificial offers threaten to defund this category of public interest lawyering. *See* Evans v. Jeff D., 475 U.S. 717, 734–36, 742–43 (1986) (permitting sacrifice offers); *id.* at 754–55 (Brennan, J., dissenting) (arguing that the majority decision would have damaging aggregate effects for enforcement of civil rights laws). For further discussion of

The accumulation of economic power is particularly important preparation for successful litigation against wealthy corporate defendants. Civil litigation is often an expensive proposition, and for any public interest lawyer to serve as a serious gladiator, she must bring the resources to fight as aggressively and persistently as her adversaries. Cases involving multiple parties and complex factual disputes can create insurmountable challenges for a firm without ample financial resources.[302] Even where fee-shifting provisions offer the possibility of fees after prevailing, the firm needs to have sufficient resources to survive until the time of any such payout. In the meantime, salaries and other overhead costs must be covered, and the firm must be financially prepared to absorb the full cost of the suit if, for any reason, the client does not prevail. This is all the more daunting given the Supreme Court's limited interpretation of what it means to prevail.[303]

To the extent that public interest lawyering includes litigation to change industry standards,[304] economic power is a prerequisite.[305] Qualitative empirical research shows examples of lawyers who have migrated

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Court-condoned obstacles to the recovery of fees for public interest lawyering, see *infra* Part IV.C. *See also* Cummings, *supra* note 14 at 89 (describing terms of one firm's retainer, which prohibits acceptance of sacrifice offers and provides for contingency fees in the absence of fees from statutory awards).

A number of these obstacles could potentially be addressed through legislation, but deeper, structural challenges remain. Because fee-shifting statutes encourage lawyers to litigate cases they are likely to win, the fee-shifting model does not necessarily support the pursuit of risky cases or clients. Yet risk may be involved in impact litigation seeking to change the law. Risk may also be required to represent marginalized clients whose voices are less likely than more privileged members of society to receive respect and empathy. If there is hope of public interest lawyering for social change, it must, at least sometimes, take on risks. One way lawyers can pursue risky cases under the fee-shifting model (or a contingency fee model), is if they support the risky work by balancing it with less risky matters. *See* Cummings, *supra* note 14, at 61 (describing how one firm develops portfolio of cases so it can pursue some riskier cases). Nonetheless, were fee-shifting statutes the only form of support for public interest lawyering, certain categories of wrongs might go unaddressed. Notably, this Article does not argue that fee-shifting is categorically superior to other forms of public interest lawyering but simply that it ought to be recognized and supported as one important form.

302. *See* COUNCIL FOR PUB. INTEREST LAW, *supra* note 26, at 143.

303. *See Buckhannon*, 532 U.S. at 603–05 (ruling that, even if litigation is the catalyst for change in defendant's behavior, plaintiff does not "prevail" for purposes of fee-shifting statute unless plaintiff obtains judgment against defendant (internal quotation mark omitted)); *see also* Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989) (holding that, in Title VII class action where intervenor unsuccessfully challenged settlement, plaintiffs could not recover fees without showing intervenor's claim to be "frivolous, unreasonable, or without foundation"); Albiston & Nielsen, *supra* note 212, at 1130 (documenting empirically that the *Buckhannon* decision has limited lawyers' case selection). For more evidence that these fee decisions do have an impact, see Brand, *supra* note 212, at 361–62.

304. *See, e.g.*, Bloom, *supra* note 199, at 96.

305. To the extent that litigation remains a viable avenue for social change, today's most successful approach may be to exact economic costs from private entities, rather than to seek ongoing injunctions against government actors. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (questioning the extent to which the judiciary can affect social change). *But see* Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Failure of Institutional Reform Litigation After* Horne v. Flores, 46 U.C. DAVIS L. REV. 1435, 1444–48 (2013) (describing ongoing importance of institutional reform litigation against government actors).

from legal aid offices to large firms precisely because they believe they can lodge more powerful attacks on corporate wrongdoers when armed with larger war chests.[306] Some might question whether attorneys earning handsome salaries at large firms deserve recognition as public interest lawyers. But access to justice should mean more than individual representation,[307] and, to the extent that structural change remains a recognized goal of public interest lawyering,[308] the enforcement and deterrent values served by economically powerful actors should not be overlooked. Such actors may be uniquely positioned to challenge corporate and government entities with significant power of their own.

Like economic strength, economic independence also improves public interest lawyering.[309] Financial dependence can limit the nature and scope of activity. To receive tax benefits as a non-profit, an organization must agree not to lobby or organize more than a limited amount.[310] Private donors, whether foundations offering grants, or members paying dues, can impose their priorities on the use of funds.[311] Both government actors and financial benefactors have been known to censor controversial public interest lawyering.[312] In contrast, a lawyer who earns her income directly from public interest lawyering is beholden to no one but her clients. This not only increases the clients' power in the representation relationship but also decreases the power of outside influences.[313] For public

306. *See* Erichson, *supra* note 5, at 2101 n.63.

307. *See* Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 875 (2004).

308. *See* ROSENBERG, *supra* note 305, at 32–33 (suggesting courts may be able to produce social change when paired with market incentives and deterrents).

309. *See also* MODEL RULES OF PROF'L CONDUCT pmbl. 11 (2012) ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. *An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.*" (emphasis added)).

310. *See supra* notes 81, 85–86 and accompanying text.

311. For a discussion of the challenges of alternative funding sources, see CHEN & CUMMINGS, *supra* note 10, at 128–42, 174, 184–86, and SCHEINGOLD, *supra* note 1, at 194–99.

312. In one important example of how public interest lawyers' activities have been restricted by funders, the Legal Services Corporation (LSC) in 1996 imposed a variety of restrictions on all lawyers in offices receiving LSC funding. Luban, *supra* note 4, at 220–24. These restrictions ranged from censoring the substance of the cases (no constitutional challenges to welfare regulations) to limiting the client population to be served (no representation of undocumented immigrants except in limited domestic violence matters) to cutting off access to other sources of support (no collection of fees under fee-shifting statutes). *Id.* at 221, 224.

313. *See* Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 294–97 (1993) (describing the authors' for-profit firm, independent of funders or a Board of Directors, as the best structure to represent clients with "a vital interest in shaking up the system" and provide "representation [that] necessarily involves aggressively challenging the existing power structures and institutions"). It should be recognized that even if, in an attempt to maintain independence from government actors and foundations, a legal services provider relies on fees, government choices still influence the success of that effort. At the most basic level, legislatures and courts determine which legal claims and defenses are cognizable and which damages are available. One example is fee-shifting provisions, which depend on the legislature to recognize the enforcement of particular laws as in the public interest and the judiciary to cooperate in awarding fees. Even the contingency fee,

interest lawyering to be free to challenge the power of governments and corporations, both economic strength and economic independence may be crucial.[314]

Neither non-profit organizations nor conventional firms engaged in pro bono activity can perform all public interest lawyering functions. The structure of non-profits creates limits and presents special challenges for capacity building.[315] Funding uncertainty and dependency can make it hard to build new programs, take risks with existing programs, and establish and maintain relationships with individuals and other organizations.[316] Securing and maintaining funding also is time-consuming and requires expertise.[317] This can strain the resources of staff time and salary budgets.[318] Further, attracting and retaining well-qualified employees can be difficult for non-profit organizations requiring long hours but paying low salaries.[319] Due to the contingent nature of funding, the security of positions may be difficult to guarantee; the lack of job security discourages potential applicants and creates stress and anxiety for current workers.[320] These difficulties can lead to a high rate of employee turnover, creating a workforce with a lack of expertise and further increasing administrative costs.[321] Additional costs tie up resources that an organization could otherwise devote to expanding its public interest lawyering. Certainly, many non-profit organizations do attract and retain highly intelligent, skilled, and dedicated staffs, and many do operate with impressive budgets. Nonetheless, it is important to acknowledge that, even for elite non-profits, obtaining and maintaining donations can be a challenge.[322]

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which may be one of the more independent sources of funding, is subject to legislative support or reduction. Capping awards, for example, can make those cases financially infeasible. *See, e.g.*, Bloom, *supra* note 199, at 108 (describing reform legislation proposed in response to litigation that was too successful).

314. *See* Gilles & Friedman, *supra* note 60, at 163 (suggesting that plaintiffs' class action lawyers "use their wealth to finance further class action litigation against U.S. companies" and "comprise the most effective lobbying counterweight to corporate interests in [American] politics").

315. *See* VENTURE PHILANTHROPY PARTNERS, EFFECTIVE CAPACITY BUILDING IN NONPROFIT ORGANIZATIONS 33–36 (2001), *available at* http://www.vppartners.org/sites/default/files/reports/full_rpt.pdf (describing model of defining and evaluating "nonprofit capacity").

316. *See* Rhode, *supra* note 71, at 2056.

317. *Id.*

318. Nell Edgington, *Overcoming the Catch-22 of Nonprofit Capacity*, SOCIAL VELOCITY (Aug. 29, 2011), http://www.socialvelocity.net/2011/08/overcoming-the-catch-22-of-nonprofit-capacity/.

319. *Cf.* VENTURE PHILANTHROPY PARTNERS, *supra* note 315, at 49–53 (explaining how some organizations overcome recruiting challenges).

320. *Cf. id.* (explaining how some non-profits have attracted professionals by providing benefits packages and generous compensation).

321. *Cf. id.* (demonstrating that some organizations have overcome human resource challenges through innovative programs).

322. *See* Rhode, *supra* note 71, at 2056 (describing fundraising challenges for even the most elite, wealthy organizations).

For PILFs, these structural challenges make industry-changing litigation difficult. Donating for discovery costs does not appeal to funders choosing among worthy causes. Simply amassing enough funds for these cases may be an insurmountable obstacle. The unreliability of funding can make it difficult to commit to a large piece of litigation, particularly one that is risky or controversial. To responsibly accept a large case, an organization must be in a suitable position, financially and in terms of available labor. In the early stages of case selection, the number of hours and years a case might demand will be uncertain, and this, in addition to the risk of losing, must be weighed. The capacity to absorb the costs of the case, in the event of a failure to prevail, is essential to public interest lawyering of this kind.

Beyond the structural challenges inherent in operating a non-profit, PILFs face additional regulatory restrictions. Although Congress created fee-shifting statutes to make certain categories of public interest lawyering profitable, the IRS limits the ability of PILFs to use fees from such cases for that purpose. To maintain the tax benefits of non-profit status, a PILF must cover no more than fifty percent of its operating costs with attorneys' fees, and it must receive at least half of its financial support from outside, non-client sources.[323] This means both its economic strength and its economic independence are necessarily curtailed.

Pro bono volunteer work by large, conventional law firms cannot fill the gaps of the non-profit sector. First, while the non-profit setting suffers from one kind of employee problem, pro bono suffers from another. Volunteer lawyers often lack relevant expertise.[324] Firms lack sufficient incentives to provide robust training because the clients, if they even know enough to identify its absence, cannot threaten to take their business elsewhere. The firms often see pro bono as a vehicle for acquiring skills; firms generally do not allow inexperienced lawyers to "practice on" paying clients.[325] In the interest of avoiding conflicts, attorneys typically volunteer in fields disconnected from the main of their work.[326] The disconnect between the fields of the attorney's paid and volunteer work can further stunt the development of expertise in the fields pursued pro bono.

Excellent representation requires knowledge and commitment, both of which are more likely to flourish when the legal services are central to an attorney's practice, rather than provided on a voluntary basis. As U.S.

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323. Rev. Proc. 92-59, 1992-2 C.B. 411 § 4(05).

324. *See* Cummings & Rhode, *supra* note 71, at 2395 (documenting inadequate knowledge and supervision of volunteer attorneys); Rhode, *supra* note 71, at 2071–72 (documenting scarcity of volunteer attorneys with relevant skills and inefficiencies of work by inexperienced counsel); *cf.* Cummings & Rhode, *supra* note 71, at 2429 (documenting that some firms seek to develop expertise in particular areas and channel volunteer efforts in those directions).

325. Cummings & Rhode, *supra* note 71, at 2426–28.

326. *Id.* at 2393.

District Judge Myron Thompson explained in the context of awarding fees to lawyers who successfully represented victims of employment discrimination:

> Both local and national pools of plaintiffs' lawyers, with an in depth knowledge about the theory and practice of employment discrimination law, are essential if the plaintiffs' perspective is to be fully and adequately represented both *in court*, in cases presenting new and complex legal issues, and *out of court*, before national and state legislative committees and before national and local bar committees where policy decisions affecting the direction of employment discrimination law are made. Fees in employment discrimination cases should therefore be awarded so a lawyer can litigate such cases for a living rather than as occasional charity work.[327]

Beyond the question of expertise, volunteers sometimes demonstrate less zeal than when they are doing their "real jobs."[328] Perhaps because they believe they are doing a good deed by engaging in charity, they approach the exploration of various strategic options and other components of zealous advocacy as voluntary. As a result, the quality of the legal services may suffer, as may the achievement of the broader aims of public interest lawyering.[329]

Additionally, although big-firm lawyers working pro bono may have more economic strength for litigation than their counterparts at nonprofit organizations, economic independence for conventional lawyers is illusory. Conventional for-profit firms function to amass profit; they seek to secure and maintain paying clients, preferably as many as possible, paying fees as high as possible. Not surprisingly, paying clients take priority over those receiving free representation. In the selection and pursuit of pro bono work, big-firm lawyers first examine their dockets of paying clients and then seek out pro bono activity that raises no potential conflict, as opposed to taking on these responsibilities in the opposite order. Lawyers have withdrawn in the middle of pro bono representation due to conflict with a paying client.[330] In this way, the economic devaluation of pro bono results in the devaluation of the work in terms of the ethical expectations of the profession.

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327. Stokes v. City of Montgomery, Ala., 706 F. Supp. 811, 817 (M.D. Ala. 1988), *aff'd mem.*, 891 F.2d 905 (11th Cir. 1989).

328. *See* Weissman, *supra* note 69, at 816 (describing critiques of volunteerism as an approach to the provision of legal services).

329. For example, if a defendant knows plaintiff's counsel is acting pro bono and therefore will litigate the case less aggressively, this could influence strategic choices in the litigation of the case or in settlement. Ultimately, it might well mean that the enforcement and deterrence goals of the litigation are compromised.

330. Cummings, *supra* note 67, at 116–20, 147 (describing how firms decline to accept, and sometimes withdraw from, cases that could create either actual conflicts with paying clients or even positional conflicts with those clients' business interests); *see also* Cummings & Sandefur, *supra* note 67, at 102.

Moreover, conventional firms engaged in pro bono work are so beholden to their paying clients, and the paying clients they hope to attract, that they will not engage in litigation that threatens the positions or business interests of these client populations. Most large firms will refuse entire categories of pro bono cases, including employment discrimination, labor rights, consumer interests, and environmental claims.[331] "[W]hen [conventional] firms do bring pro bono civil rights cases, they tend to bring them against state and local governments—who have their own in-house attorneys—rather than against private corporations for whose business [the firms] might compete."[332] Ultimately, most large, conventional firms will not engage in pro bono litigation that threatens the business interests of large corporate defendants, let alone entire industries.[333]

C. Public Interest Practice for Profit

Congress recognized the limits of relying on charity for public interest lawyering.[334] Congress believed that public interest lawyering would have to be profitable for lawyers to pursue it with the frequency and force required for effective enforcement and deterrence.[335] The legislature passed numerous fee-shifting statutes for this reason.[336] However, the ongoing perception of public interest lawyering as free services by non-profits and pro bono donations threatens the success of the legislature's vision.

In a variety of decisions from the Supreme Court and lower courts, judges have demonstrated ambivalence about awarding fees under fee-shifting statutes. They have rationalized their decisions by suggesting that public interest lawyers can be expected to act in spite of, and sometimes in opposition to, their own economic incentives.[337] This overly generous, perhaps patronizing, view of public interest lawyers contrasts with the assumptions the judges bring to the interpretation of other ac-

331. Cummings & Rhode, *supra* note 71, at 2393 (amassing evidence that firms avoid employment, consumer, and environmental claims likely to involve suits against major corporations).

332. Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1463 (2007).

333. Weissman, *supra* note 69, at 816–17 ("Pro bono services, like foundation funded projects, do not typically include representation in matters that challenge structural inequities, nor do they seek solutions to fundamental injustices.").

334. *See* Evans v. Jeff D., 475 U.S. 717, 747–48 (1986) (Brennan, J., dissenting) (citing legislative history describing strain on legal aid organizations and unavailability of counsel); *see also* Miller v. Amusement Enters., Inc., 426 F.2d 534, 539 (5th Cir. 1970) ("Congress did not intend that vindication of statutorily guaranteed rights would depend on . . . the availability of legal assistance from charity—individual, collective or organized. An enactment aimed at legislatively enhancing human rights and the dignity of man through equality of treatment would hardly be served by compelling victims to seek out charitable help.").

335. *Evans*, 475 U.S. at 748–52 (Brennan, J., dissenting).

336. *See supra* note 213.

337. *See supra* Part II.B.2.

tors.[338] The results pose a real danger for the viability of important categories of public interest lawyering. Attorneys cannot litigate industry-changing litigation without first accumulating significant economic resources. Small, for-profit firms are the main individual enforcers of civil rights laws,[339] and they too cannot afford to pursue public interest lawyering for free.

Jeffrey Brand's review of the Supreme Court's fee-shifting decisions from 1976 to 1990 demonstrates the Justices' "assumption that public interest litigation is not part and parcel of ordinary practice, but is more in the nature of charity or volunteer work."[340] Professor Brand highlights a string of cases in which the Court has limited the effectiveness of fee-shifting statutes. A few examples from his analysis should suffice to make the point.

In *Marek v. Chesny*,[341] a Section 1983[342] case brought by a father whose son had been shot and killed by police officers, the Court held that Rule 68 offers of judgment could cut off entitlement to fees governed by fee-shifting statutes.[343] The decision opened up the possibility of a strong pecuniary interest on behalf of the lawyer—to settle and get paid rather than risk years more work for no reward—that could directly oppose her client's interest going forward. The *Marek* majority acknowledged that its holding could "serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer," but surmised that "[m]erely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit."[344] In other contexts, the Court has sought to remove conventional lawyers from situations where pecuniary interests could test their ethical commitments; for example, the Court has approved the general use of solicitation prohibitions.[345] Nonetheless, in the case of public interest lawyering, the Court expects a lawyer to rise above such challenges and continue the work even if denied financial

338. *See supra* notes 186–99 and accompanying text (describing the Court's approach to solicitation rules in *Ohralik*).

339. *See* Bagenstos, *supra* note 332, at 1460–61 (citing Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768 (1988), and Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 162–64 (Richard B. Freeman et al. eds., 2005)).

340. Brand, *supra* note 212, at 373; *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 530 (1986) (describing judicial hostility in case limiting veterans' rights lawyers to fees of ten dollars).

341. 473 U.S. 1 (1985).

342. 42 U.S.C. § 1983 (2012).

343. *Marek*, 473 U.S. at 11–12.

344. Brand, *supra* note 212, at 357 n.397 (alteration in original) (quoting *Marek*, 473 U.S. at 10) (internal quotation marks omitted).

345. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978) (reasoning that presence of a pecuniary motive is "inherently conducive to overreaching and other forms of misconduct").

support. The *Marek* majority failed to come to terms with the ethical conflict its decision permitted and the serious ramifications for civil rights enforcement.

In *Evans v. Jeff D.*,[346] the Supreme Court ruled that after years of protracted settlement discussions in a class action concerning inadequate education and healthcare for disabled children, defense counsel could condition a consent decree on plaintiffs' counsel waiving all costs and attorneys' fees.[347] The majority claimed to be "cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases," but the majority determined that the likelihood of such a result was remote.[348]

Again, the Court's analysis suggested public interest lawyers have no pecuniary needs. The *Jeff D.* plaintiffs had sought an injunction to repair educational and health care systems but requested no monetary damages, other than payment of the fees and costs accumulated during the litigation.[349] Three years into the case and one week before trial, the defendants offered injunctive relief in exchange for a waiver of fees and costs.[350] Given the offer of virtually everything the plaintiffs wanted, their attorney felt ethically bound to advise his clients to accept, even if that meant his office had to absorb the accumulated costs of the litigation.[351] The parties agreed to a settlement that made the waiver of fees and costs conditional on the court's approval.[352] The plaintiffs' counsel then filed a motion asking the court to order the defendant to pay costs and fees.[353] He argued that requiring his office to absorb these expenses when the plaintiffs had essentially prevailed—after years of litigation fueled by thousands of hours of public interest lawyering of the kind encouraged by Congress—undermined the spirit of the fee shifting provisions.[354] The lower court and Supreme Court rejected this argument.[355]

The majority ruled that plaintiffs' counsel faced no ethical "dilemma" because he had "no *ethical* obligation" to recover statutory fees.[356] This approach suggests that ensuring payment for public interest lawyers has no broader purpose, or at least that removing payment would have no impact on that broader purpose. And yet the fee-shifting provisions were

346. 475 U.S. 717 (1986).
347. *Id.* at 721–28.
348. *Id.* at 741 & n.34. *But see id.* at 754–55 (Brennan, J. dissenting) (pointing to such evidence).
349. *Id.* at 721 (majority opinion).
350. *Id.* at 722.
351. *Id.*
352. *Id.*
353. *Id.* at 723.
354. *See id.*
355. *Id.* at 723–24, 728.
356. *Id.* at 728 (internal quotation marks omitted).

adopted precisely because this is not a realistic approach to human behavior. In fact, contrary to the *Jeff D.* majority's assertion that there was no evidentiary basis for the concerns that the decision could have an "aggregate" effect, the legislative history of the Fees Act does include such evidence.[357]

Nonetheless, in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*,[358] a case that limited the calculation of awards under the fee-shifting provision of the Clean Air Act,[359] the plurality again assumed that profit has minimal impact on public interest lawyering.[360] In this case, the plaintiffs' counsel, after prevailing, argued that calculation of their fee should reflect the level of risk the attorneys absorbed by accepting a case with slim chances of success (and winning it).[361] The Court, in a fractured opinion, restricted the availability of such a risk enhancement.[362] Confronted with the point that such a decision would dim prospects for future representation in similarly meritorious but risky cases, the plurality explained, "[W]ithout the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond that the goal of the fee-shifting statutes will not be achieved."[363] In referring to "the bar in general," the Justices seem to suggest that even if fees are not available, the profession can expect someone to step in and take these cases. Perhaps the Justices expect non-profit organizations to rely on donors for support, or perhaps they imagine that for-profit organizations will pursue these cases pro bono. Yet, the costs and risks of such lengthy and complex environmental cases make them infeasible without financial support.

Professor Brand identified "a deeply held view that public interest lawyers should be expected to act on a higher moral plane and should not be subject to the same economic pressures as other practicing civil litigators."[364] Building on that observation, Sam Bagenstos has also suggested that more recent decisions reflect "a fundamentally prissy, goo-goo" view of civil rights lawyers as pious devotees who should not be moti-

357. *See id.* at 741 n.34; *see also* Albiston & Nielsen, *supra* note 212 (documenting empirically that the *Buckhannon* decision has limited lawyers' case selection). For more evidence on the fact that these fee decisions do have an impact, see Brand, *supra* note 212, at 361–62.

358. 483 U.S. 711 (1987).

359. 42 U.S.C. § 7604(d) (2012).

360. *Delaware Valley*, 483 U.S. at 727.

361. *See id.* at 714; *id.* at 740–42 (Blackmun, J., dissenting).

362. *Id.* at 734 (O'Connor, J., concurring).

363. *See* Brand, *supra* note 212, at 355 n.387 (quoting *Delaware Valley*, 483 U.S. at 727 (plurality opinion)) (internal quotation mark omitted).

364. *Id.* at 373. *See also* Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 193–94 (2d Cir. 2007) (reasoning that public interest cases should garner lower fees than regular lodestar because lawyers have other incentives to do the cases). *But see* Perdue v. Kenny A., 559 U.S. 542, 546 (2010) (holding that fee-shifting statutes may be used to increase attorneys' fees in extraordinary situations).

vated by financial interests.[365] The issue goes beyond civil rights lawyers to public interest lawyering more generally, and to a deeper difficulty with reconciling public interest lawyering and profit. To be clear, in the case of civil rights,[366] the problem is likely compounded by some judges' distaste for this particular type of work and perhaps their doubts as to whether the litigation does serve the public interest. Yet it should not be overlooked that the view of public interest lawyering as pious, a view often perpetuated by non-profit and conventional lawyers alike, helps to buttress the judges' decisions.

The common confusion about the definition of public interest lawyering has significant real-world consequences. If we keep in mind that fee-shifting statutes are designed for more than the individual litigants and are aimed at the broader public interest, it is harder to paint the lawyers as greedy for seeking financial compensation,[367] and harder to shrug off the aggregate public impact of refusing to provide this support. The view of public interest lawyering as a charitable endeavor may be clouding the judges' thinking. Moreover, the widespread acceptance of that view obscures the reality that fee-limiting decisions are, intentionally or not, defunding public interest lawyering and "taking out the adversary"[368] of corporate and government power.

CONCLUSION

With few exceptions,[369] the legal profession understands public interest lawyering as charity work donated by non-profits or volunteers, operating outside the market for legal services. Defining public interest work in terms of the absence of pecuniary gain neglects the substantive value of the work. This understanding not only is incomplete, but also damages the pursuit of public interest law and, ultimately, the profession. It threatens the viability of important public interest lawyering work because it fosters an environment in which public interest lawyers seeking

365. Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don't Get It)* 4–5 (Univ. of Michigan Law School, Public Law and Legal Theory Working Paper Series No. 150, 2009), *available at* http://ssrn.com/abstract=1407275; Bagenstos, *supra* note 332, at 1464–66; *see* Brand, *supra* note 212, at 373–75.

366. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 310 (1977) (pointing out that antitrust lawyers received statutory fees averaging $181 per hour, while those engaged in comparable civil rights litigation were compensated at the rate of $40 per hour).

367. *See* Reda, *supra* note 247, at 1116–17 (collecting literature).

368. *See* Luban, *supra* note 4, at 213 (internal quotation marks omitted).

369. One increasingly dynamic area is law schools' loan repayment assistance programs. *See* sources cited *supra* note 9. Roughly one quarter of the top 50 law schools in the United States currently recognize for-profit work as public interest, depending on the substance of the firms' dockets. Kathryn A. Sabbeth, Loan Repayment Eligibility Requirements and Their Implications (unpublished report) (on file with author). Eligibility requirements of most law schools' loan repayment programs can be found on the schools websites.

market-rate fees encounter skepticism.[370] If they cannot collect fees, they will remain beholden to powerful economic and political actors who can limit, and historically have limited, their work.[371]

The dichotomized view of public interest lawyering and making a profit also threatens the profession as a whole. Despite the many lawyers who need work and the large quantity of work worth doing, there is dwindling funding to connect the two.[372] Defining public interest lawyering as an activity divorced from independent economic support makes it unavailable to most as a career. Developing a more nuanced and flexible approach could broaden the professional outlook.

There are various opportunities, from pro bono awards to financial subsidies, where the legal profession can and should explore the question of which lawyering to promote in the public interest. The answers should be context-specific and will necessarily reflect and promote the values of the institutions involved.[373] While the definitional project will be challenging,[374] and people will disagree,[375] if we recognize doing good as a duty of the legal profession, it is necessary to struggle with what that means.

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370. *See* Bagenstos, *supra* note 365, at 4–5; Bagenstos, *supra* note 332, at 1464–66; Brand, *supra* note 212, at 373–75.

371. *See* Luban, *supra* note 4, at 241–44. It must be recognized that public interest lawyering in profit-generating settings carries its own challenges. Certain categories of cases or clients may receive lower priority or be neglected completely. *See supra* note 301 (describing risk-aversion of lawyers seeking fees); *supra* note 331 and accompanying text (describing how for-profit firms reject employment and environmental cases perceived to create conflicts of interest with industry clients); Cummings, *supra* note 14, at 90 (describing how the search for profit causes a firm to prioritize cases seeking monetary damages over cases seeking injunctive relief, because of the difference in availability of contingency fees); Cummings, *supra* note 14, at 91 (suggesting that "privatizing [public interest lawyering] may produce better litigation [but] not better social outcomes). To be clear, this Article does not argue that fee-based, for-profit models of public interest lawyering are superior to all others; rather, it suggests that such models offer particular strengths for particular contexts, and ought to be recognized and supported as one important form of public interest lawyering among others.

372. *See generally* STEVEN J. HARPER, THE LAWYER BUBBLE: A PROFESSION IN CRISIS, 3 (2013); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

373. *See* CHEN & CUMMINGS, *supra* note 10, at 7 (arguing that the term "public interest law . . . asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms") (internal punctuation omitted).

374. *See, e.g.*, Luban, *supra* note 4, at 210 n.1; Esquivel, *supra* note 15, at 328. Drawing on comparative law literature may help us to approach this challenge in new and creative ways. *See, e.g.*, Po Jen Yap & Holning Lau, *Public Interest Litigation in Asia: An Overview*, *in* PUBLIC INTEREST LITIGATION IN ASIA 1, 2 (Po Jen Yap & Holning Lau eds., 2011) (explaining that standing doctrine in Hong Kong and India depend on defining public interest lawyering).

375. *See* Houck, *supra* note 12, at 1420–21 (arguing that non-profit organizations supporting corporate interests should not be recognized as PILFs because they do not increase access for underrepresented groups or interests); Southworth, supra note 16, at 1250–52 (explaining that progressive legislation does not represent a universally recognized public interest but instead reflects distributional priorities with which conservative members of the public disagree).

SPEECH, ASSOCIATION, CONSCIENCE, AND THE FIRST AMENDMENT'S ORIENTATION

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ABSTRACT

More and more states are permitting same-sex unions to be celebrated, which will likely result in an increase in the number of individuals claiming that they are precluded by conscience from providing goods or services to such families. While the First Amendment to the United States Constitution provides great protection to religious belief, it provides much less protection to conscience-based conduct in violation of nondiscrimination statutes, especially when such refusals of conscience are in a commercial context.

This Article discusses a variety of cases that are often thought to implicate matters of conscience—compelled speech, symbolic conduct, conscientious objection—as well as several unemployment benefits and right of association cases. While these cases might be interpreted in a number of ways, they nonetheless seem to provide relatively little protection to conscience-based refusals to engage in allegedly symbolic activities that themselves might be interpreted in a number of ways.

After providing an analysis of existing constitutional protections, the Article focuses on *Elane Photography v. Willock*, explaining how the case should be decided in light of existing constitutional guarantees as they have been explained by the Court. The Article concludes that were the Court to ignore the current jurisprudence and find such conscience-based actions protected under the Federal Constitution, the Court would thereby create an exception that was difficult if not impossible to cabin, which would lead to a variety of regrettable consequences.

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I. INTRODUCTION

More and more states are affording recognition to same-sex relationships either by amending their marriage statutes or by creating a separate civil union or domestic partnership status. These developments have not been greeted with universal acclaim. Indeed, some claim that the promotion of same-sex marriage contravenes their religious principles and that they should not be forced to violate their consciences by providing services to same-sex couples and their families. As more states accord rights to sexual minorities, an increasing number of individuals will likely claim that the First Amendment immunizes their conscience-based refusals to provide goods or services to such allegedly objectionable families.

Last term, the United States Supreme Court heard two cases with implications for same-sex couples and their families: *United States v. Windsor*[1] and *Hollingsworth v. Perry*.[2] The former resulted in Section 3 of the Defense of Marriage Act (DOMA) being struck down,[3] whereas the denial of standing in the latter[4] resulted in California again permitting same-sex marriages to be celebrated.[5] Because more and more states

1. 133 S. Ct. 2675 (2013).
2. 133 S. Ct. 2652 (2013).
3. *Windsor*, 133 S. Ct. at 2696 ("The federal statute is invalid . . . .").
4. *Hollingsworth*, 133 S. Ct. at 2668 ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.").
5. Eric Woomer, *Same-Sex Couples Marry in County*, DESERT SUN, July 2, 2013, at A3 ("Same-sex marriages are underway in California . . . .").

(including California) now permit same-sex marriages to be celebrated, the number of individuals who may seek a conscience-based exemption for their refusals to provide services to same-sex couples and their children will likely also increase. Ultimately, the United States Supreme Court will have to clarify the conditions under which individuals are entitled to conscience-based exemptions from the application of neutral laws.

Thus far, the Court has given contradictory signals about the protections afforded to conscience. While individuals cannot be forced to affirm principles that they do not believe, the protections for symbolic conduct are less clear. In addition, the Court has repeatedly emphasized that individuals engaging in commerce do not have the same constitutionally protected associational freedoms as they would in a noncommercial context. Finally, while the Court has sometimes implied that the Constitution takes religious convictions seriously, the Court's decisions do not suggest that such convictions will trump the application of nondiscrimination laws in the commercial context. In short, a significant change in the current jurisprudence would be required for such conscience-based-exemption claims to win the day.

This Article examines several First Amendment grounds upon which an exemption to providing goods or services to same-sex couples and their children might be founded, analyzes how the Court has applied First Amendment jurisprudence when discrimination on the basis of orientation was at issue, and then focuses on how a much discussed case—*Elane Photography, L.L.C. v. Willock*[6]—should be decided. This Article concludes that the First Amendment neither does nor should immunize individuals engaging in commerce from nondiscrimination laws, religious qualms about treating customers and clients equally notwithstanding.

II. FIRST AMENDMENT JURISPRUDENCE

The First Amendment limits the degree to which the state can require private individuals to speak or to remain silent[7]—absent compelling justification, the state cannot force individuals to affirm a principle in which they do not believe.[8] Further, the state cannot require organizations to extend membership to nondesired individuals if so doing would

6. 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013).

7. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

8. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

change the organization's message.[9] In addition, the Court has recognized that individuals place great importance on being able to act in accord with their religious convictions.[10] In short, the First Amendment offers significant protections against government interference with expression and association, and some protection for conscience.

A. Protections Against Compelled Speech

In *West Virginia State Board of Education v. Barnette*,[11] the Court addressed whether children in public schools could be forced to salute the flag in contravention of their faith.[12] The Court rejected the proposition that the Constitution permits the state to force an individual "to utter what is not in his mind."[13] At least in part because the "sole conflict [wa]s between authority [i.e., the state] and rights of the individual"[14] and because the "freedom asserted by these appellees d[id] not bring them into collision with rights asserted by any other individual,"[15] the Court overruled *Minersville School District v. Gobitis*[16] and struck down the flag salute requirement.[17] In a stirring and frequently cited passage,[18] the Court explained, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[19]

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9. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) ("In this respect, freedom of association receives protection as a fundamental element of personal liberty. . . . [T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.").

10. *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (holding that it was a violation of the free exercise of religion of the First Amendment to deny unemployment compensation benefits to a claimant who left his job for religious reasons); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that it is unconstitutional to apply eligibility provisions for unemployment compensation such that a claimant who refused employment because it required her to work on Saturdays in contravention of her religious beliefs would be denied benefits).

11. 319 U.S. 624 (1943).

12. *See id.* at 629.

13. *Id.* at 634, 642.

14. *Id.* at 630.

15. *Id.*

16. 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. at 642.

17. *Barnette*, 319 U.S. at 642.

18. *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 500 (2007) (quoting *Barnette*, 319 U.S. at 642); Clingman v. Beaver, 544 U.S. 581, 616 (2005) (quoting *Barnette*, 319 U.S. at 642); Texas v. Johnson, 491 U.S. 397, 415 (1989) (quoting *Barnette*, 319 U.S. at 642); Wallace v. Jaffree, 472 U.S. 38, 55 (1985) (quoting *Barnette*, 319 U.S. at 642); Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (quoting *Barnette*, 319 U.S. at 642); Branti v. Finkel, 445 U.S. 507, 514 n.9 (1980) (quoting *Barnette*, 319 U.S. at 642); Elrod v. Burns, 427 U.S. 347, 356 (1976) (quoting *Barnette*, 319 U.S. at 642); Street v. New York, 394 U.S. 576, 593 (1969) (quoting *Barnette*, 319 U.S. at 641–42); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 244 n.15 (1957) (quoting *Barnette*, 319 U.S. at 642).

19. *Barnette*, 319 U.S. at 642.

Yet it is not always clear when one's required action is equivalent to a forced confession contravening one's beliefs,[20] and the Court has offered too little guidance about how to resolve difficult cases. Instead, the *Barnette* Court simply stated that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."[21] Precisely because the flag salute in that context was a "form of utterance"[22] symbolizing one's "adherence to government as presently organized"[23] and one's "acceptance of the political ideas [the flag] bespeaks,"[24] there was no need to discuss what a more ambiguous physical action in a more neutral context would mean.[25]

In *Wooley v. Maynard*,[26] the Court was afforded another opportunity to discuss the conditions under which behavior would constitute a forced affirmation. At issue was a New Hampshire requirement that the state motto, "Live Free or Die," not be obscured on passenger license plates.[27] George and Maxine Maynard were Jehovah's Witnesses who believed the state motto was "repugnant to their moral, religious, and political beliefs"[28] and who began to cover up the motto.[29] The Court framed the legal question as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[30] But characterizing the legal question in this way almost guaranteed the result—it is as if what was at issue was whether the state could force an individual to post political signs such as "Vote for Jones" in her yard.[31]

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20. *Cf.* Lee v. Weisman, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting) ("But if it is a permissible inference that one who is standing is doing so simply out of respect for the prayers of others that are in progress, then how can it possibly be said that a 'reasonable dissenter . . . could believe that the group exercise signified her own participation or approval'?" (quoting *Lee*, 505 U.S. at 593 (majority opinion))).

21. *Barnette*, 319 U.S. at 633.

22. *Id.* at 632.

23. *Id.* at 633.

24. *Id.*

25. *See* Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1126 (2010) ("But for the presence of the flag, the forced salute might be thought to have a much different meaning. For example, were that same movement part of an exercise in a physical education class where no flag was nearby, the compelled movement would not implicate the same constitutional concerns, because it would not carry the same symbolism.").

26. 430 U.S. 705 (1977).

27. *Id.* at 706–07 ("The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.").

28. *Id.* at 707.

29. *Id.* at 708.

30. *Id.* at 713.

31. *See* Laura Jackson, Case Note, *The Constitution—It's What's for Dinner*, 2 WYO. L. REV. 617, 626 (2002) (explaining that *Wooley* "addressed the issue of whether the State could require a person to display a political message on private property"); Katherine Earle Yanes, Note, Glickman v. Wileman Bros. & Elliot, Inc.: *Has the Supreme Court Lost Its Way?*, 27 STETSON L. REV. 1461, 1473 (1998) (same).

The *Wooley* Court referred to *Barnette*, noting that "[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate."[32] However, the Court characterized "the difference [a]s essentially one of degree,"[33] holding that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[34] Such a holding was unsurprising, given that the Court was in effect characterizing the New Hampshire law as a kind of commandeering of private individuals by the state to disseminate an approved message. The Court described the state measure as "forc[ing] an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable,"[35] and held that the state was precluded by the Constitution from using its citizens in this way.[36]

The difficulty was not that the state's message was itself so objectionable, since New Hampshire's attempt to foster a "proper appreciation of history, state pride, and individualism"[37] was likely welcomed by many.[38] Rather, "the State's interest [in] disseminat[ing] an ideology . . . cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[39] While the First Amendment does not impose limits on what the government may say,[40] it does impose limits on what the Government may force an individual to say.[41]

Then-Justice Rehnquist dissented in *Wooley* on the ground that the "State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture."[42] Rehnquist's dissent might be interpreted to have been making either of two different points. The first is that having the slogan "Live Free or Die" on a license plate should not be construed as speech at all, perhaps because the letters would be too

32. *Wooley*, 430 U.S. at 714–15.
33. *Id.* at 715.
34. *Id.*
35. *Id.*
36. *Id.*; Vikram David Amar, *Reflections on the Doctrinal and Big-Picture Issues Raised by the Constitutional Challenges to the Patient Protection and Affordable Care Act (Obamacare)*, 6 FIU L. REV. 9, 22 (2010) ("[T]he First Amendment prohibits government from mandating that individuals be vessels for government speech.").
37. *Wooley*, 430 U.S. at 717.
38. *Id.* at 715 ("The fact that most individuals agree with the thrust of New Hampshire's motto is not the test.").
39. *Id.* at 717.
40. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech." (citing Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005))).
41. *See Johanns*, 544 U.S. at 557 ("We have sustained First Amendment challenges to allegedly compelled expression in . . . true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government.").
42. *Wooley*, 430 U.S. at 720 (Rehnquist, J., dissenting).

small to be seen or because the writing would be viewed as decorative rather than as conveying information.[43] However, current experience belies that such expressions are viewed as not conveying any message. For example, several states permit individuals to choose the message that is on their license plates.[44] The difficult question for the courts has not been whether the specialty license plates constitute speech but, instead, whether the speech is government speech, private speech, or both.[45]

At issue in *Wooley* was not the speech that the Maynards had chosen to place on their license plate but, instead, the speech that New Hampshire required. A different interpretation of Justice Rehnquist's point is that the speech would likely be attributed to the state rather than to the Maynards and that they would not be inferred to be endorsing anything.[46] Thus, someone seeing the Maynards' license plate would not impute any beliefs about freedom or death to the Maynards themselves.

Suppose that the Court had accepted Justice Rehnquist's assessment that no one would impute an endorsement of the state motto to the Maynards. The New Hampshire requirement might nonetheless have been found constitutionally offensive if the license plate was viewed as private[47] rather than governmental property[48] for a reason having nothing to do with expression—for example, that the state was effecting a taking.[49] In that event, however, *Wooley* would not be viewed as a seminal First Amendment case.[50]

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43. *Cf.* Nancy Cook, *Breaking Silence with Ourselves: Stepping out of Safe Boundaries*, 29 LAW & SOC'Y REV. 757, 759 (1995) (discussing "using words . . . merely as decorative diversions").

44. *See, e.g.*, ACLU of Tenn. v. Bredesen, 441 F.3d 370, 372 (6th Cir. 2006) ("Tennessee statutory law authorizes the sale of premium-priced license plates bearing special logotypes to raise revenue for specific 'departments, agencies, charities, programs[,] and other activities impacting Tennessee.'" (quoting TENN. CODE ANN. § 55-4-201(i) (2013))); *see also* Nelda H. Cambron-McCabe, Commentary, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine*, 274 EDUC. L. REP. (WEST) 753, 762 (2012) ("Today specialty license plates have proliferated as states have opened up a market that generates revenue for the state, and oftentimes to the groups sponsoring specialty plates.").

45. *See* Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[T]he speech that appears on the so-called 'special' or 'vanity' license plate could prove to be the quintessential example of speech that is both private and governmental . . . ."); Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1479–80 (2011) (arguing that "the expression emanating from specialty license plates is both governmental and private").

46. *Wooley*, 430 U.S. at 720–21 (Rehnquist, J., dissenting) ("The issue, unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.").

47. The Court explained that "New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715. But the Court did not specify whether the license, rather than the license plate, was the private property.

48. Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1680 (2010) ("[L]license plates are considered to be governmental, rather than private property.").

49. *Cf.* Gregory C. Sisk, *Returning to the Pruneyard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 413 (2009) ("[T]he governmentally encouraged physical invasion by strangers onto private property for speech, distribu-

Nonetheless, the Court's rationale in both *Barnette* and *Wooley* affords robust protection against compelled speech;[51] the state cannot force individuals to affirm messages that they do not believe. A separate issue, however, involves the degree to which the symbolic conduct of private individuals is protected.

B. Protections for Symbolic Conduct

In *United States v. O'Brien*,[52] the Court announced the test for determining the conditions under which the state regulation of symbolic conduct violates constitutional guarantees. At issue was the criminal prosecution of an individual for intentionally burning a draft card in front of a courthouse.[53] This act was performed during a period of social unrest due to opposition to the Vietnam War,[54] and O'Brien claimed that Congress was trying to limit speech by targeting the burning of draft cards.[55] The Court held that O'Brien's action was not properly characterized as speech, rejecting "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[56]

Even if burning the draft card was not speech per se, a separate question was whether O'Brien's action was nonetheless entitled to some First Amendment protection, and the Court was willing to assume that it was.[57] But that did not settle whether his action was immune from prosecution.[58] The Court outlined the relevant test for the regulation of sym-

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tion of flyers, or any other purpose that the owner does not authorize is a classic example of a *per se* taking.").

50. *See* Lauren R. Robbins, Comment, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 167 (2009) (describing "Wooley v. Maynard [as one of the Court's] . . . seminal speech cases"). *See generally* Lorin Brennan, *The Public Policy of Information Licensing*, 36 HOUS. L. REV. 61, 84 (1999) (discussing "the seminal case of *Wooley v. Maynard*").

51. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 712 (2011) (describing *Wooley* and *Barnette* as "landmark cases" establishing the right to refrain from speaking); Susan Nabet, Note, *For Sale: The Threat of State Public Accommodations Laws to the First Amendment Rights of Artistic Businesses*, 77 BROOK. L. REV. 1515, 1525 (2012) ("The right not to speak is most famously set forth in two Supreme Court cases, *West Virginia State Board of Education v. Barnette* and *Wooley v. Maynard*.").

52. 391 U.S. 367 (1968).

53. *Id.* at 369 ("David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse.").

54. *Cf.* David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 195, 209 (2013) ("[T]he actual government purpose in *O'Brien* was to prohibit draft card destruction as an expression of opposition to the draft and the [Vietnam] War . . . .").

55. *O'Brien*, 391 U.S. at 376 ("O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the 'purpose' of Congress was 'to suppress freedom of speech.'").

56. *Id.*

57. *Id.* (proceeding "on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment").

58. *Id.* ("[I]t does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").

bolic conduct, explaining that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[59] The Court summed up the test in the following way:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[60]

When using the "no greater than is essential" language, the *O'Brien* Court was not implying that narrow tailoring was required. On the contrary, the kind of tailoring required in the symbolic conduct context is less exacting than the kind of tailoring required in the regulation of pure speech.[61] The Court employs intermediate scrutiny to evaluate state regulation of symbolic speech,[62] and strict scrutiny with respect to the regulation of pure expression.[63]

There are two distinct respects in which *O'Brien* may be important to consider in the context of a refusal to provide services for conscience-based reasons. First, the Court is suggesting that merely because an individual believes that her conduct is expressive will not make it so for constitutional purposes. Second, even if a regulation affects conduct that is expressive, that regulation may be subject to intermediate rather than strict scrutiny and thus may be upheld as long as it promotes important state interests.

Two issues should be distinguished. One is whether a particular action should be characterized as pure speech rather than symbolic conduct. A different issue is whether an action is religiously inspired, because then an analysis may be necessary to determine whether the expression at issue—whether or not pure speech—must be accorded special protection because it was required by conscience.

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59. *Id.*

60. *Id.* at 377.

61. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 478 (1989) ("[W]ith respect to government regulation of expressive conduct, including conduct expressive of political views . . . we have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989))).

62. *See* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 293 (2012) ("[T]he intermediate scrutiny test [is] used in *O'Brien* to determine the validity of government restrictions on symbolic speech.").

63. *See* Laura Markey, Article, *Repairing the Rusty Needle: Recognizing First Amendment Protection for Tattoos*, 21 KAN. J.L. & PUB. POL'Y 310, 311 (2012) ("If the government attempts to restrict pure speech based on the content of the speech, it must overcome a presumption of unconstitutionality and the strictest standard of judicial review, strict scrutiny.").

C. Protections for Conscience

The Court has addressed the protections that should be accorded to conscience-based activity in a few different kinds of cases. Some spelled out the conditions under which conscientious objector status in particular would be accorded, while others helped delimit more generally the extent to which conscience-based activities would be protected.

Consider the Court's discussion of conscientious objector status in *United States v. Seeger*.[64] At issue was the proper interpretation of a federal statute affording an exemption "from combatant training and service in the armed forces of the United States [to] those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form."[65] David Seeger "declared that he was conscientiously opposed to participation in war in any form by reason of his 'religious' belief,"[66] although his "belief was not in relation to a Supreme Being as commonly understood."[67] The Court interpreted congressional intent to include someone whose "given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[68] This interpretation was a matter of statutory construction,[69] although Justice Douglas suggested in his concurrence that a contrary interpretation would have resulted in a violation of constitutional guarantees.[70] *Seeger* has been interpreted to stand for a robust protection of conscience.[71]

Welsh v. United States[72] involved another conscientious exemption claim, and that plurality opinion also affords robust protections to conscience Elliott Welsh II "held deep conscientious scruples against taking part in wars where people were killed,"[73] although Welsh was "explicit . . . in denying that his views were religious."[74] This case might also be

64. 380 U.S. 163, 166 (1965).

65. *Id.* at 164–65. The relevant section was "6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. s 456(j) (1958 ed.)." *See id.* at 164.

66. *Id.* at 166.

67. *Id.* at 167.

68. *Id.* at 166.

69. *Id.* at 165–66 ("We have concluded that Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.").

70. *Id.* at 188 (Douglas, J., concurring).

71. *See* Michael Rhea, Comment, *Denying and Defining Religion Under the First Amendment: Waldorf Education as a Lens for Advocating a Broad Definitional Approach*, 72 LA. L. REV. 1095, 1112 (2012) (reading *Seeger* to stand for the proposition that "individual interests in freedom of conscience and of religion are to be protected as sacred even in the face of important state policies").

72. 398 U.S. 333 (1970).

73. *Id.* at 337.

74. *Id.* at 341.

interpreted to be a testament to the required state accommodation of conscience.[75]

There is reason to believe, however, that conscience is not afforded such robust protection after all. For example, *Gillette v. United States*[76] involved whether an individual who had religious objections to a particular war was entitled to conscientious objector status on that account. Guy Gillette "stated his willingness to participate in a war of national defense or a war sponsored by the United Nations as a peace-keeping measure, but declared his opposition to American military operations in Vietnam, which he characterized as 'unjust.'"[77] Gillette argued that "Congress interferes with free exercise of religion by failing to relieve objectors to a particular war from military service, when the objection is religious or conscientious in nature."[78] The Court recognized that some religions distinguish among just and unjust wars, only prohibiting participation in the latter,[79] and did not question Gillette's sincere conviction that this war was unjust and hence that participation in it would contravene his religious principles.[80] Nonetheless, the Court held that "valid neutral reasons exist for limiting the exemption to objectors to all war,"[81] and affirmed the lower court holding that Gillette was not entitled to an exemption.[82]

Some of the cases implicating conscience concern a refusal to perform a job or work at certain times for religious reasons. *Sherbert v. Verner*[83] involved an individual, Adell Sherbert, who could not work on Saturday because of her religious beliefs.[84] She was not only fired from her job because of her refusal to work on that day[85] but also could not secure any other job for that same reason.[86] Her application for unemployment

75. *See* Rhea, *supra* note 71, at 1112.

76. 401 U.S. 437 (1971).

77. *Id.* at 439.

78. *Id.* at 448–49.

79. *Id.* at 452 ("[S]ome religious faiths themselves distinguish between personal participation in 'just' and in 'unjust' wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths—and individuals whose personal beliefs of a religious nature include the distinction—cannot object to all wars consistently with what is regarded as the true imperative of conscience.").

80. *Id.* at 449 (assuming that the "beliefs concerning war have roots that are 'religious' in nature within the meaning of the Amendment").

81. *Id.* at 454.

82. *Id.* at 463 ("[I]n Gillette's case (No. 85) there was a basis in fact to support administrative denial of exemption . . . .").

83. 374 U.S. 398 (1963).

84. *Id.* at 399 ("Appellant, a member of the Seventh-day Adventist Church[,] . . . would not work on Saturday, the Sabbath Day of her faith.").

85. *Id.* ("Appellant . . . was discharged by her South Carolina employer because she would not work on Saturday . . . .").

86. *Id.* ("[S]he was unable to obtain other employment because from conscientious scruples she would not take Saturday work . . . .").

benefits was denied because her refusal to work on Saturdays was viewed as a disqualifying condition.[87]

The United States Supreme Court noted that Sherbert was being forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand,"[88] and held that "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."[89] The *Sherbert* Court qualified its holding, expressly rejecting "the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment."[90]

Thomas v. Review Board of the Indiana Employment Security Division[91] also involved the denial of unemployment benefits to someone who could not work for religious reasons. Eddie Thomas quit when he was transferred from a position in the roll foundry to a position making tank turrets.[92] Making war materials contravened his religious beliefs,[93] although a friend of his who was also a Jehovah's Witness did not feel similar compunctions about the work.[94] Thomas's application for unemployment benefits was denied, because he lacked the necessary "good cause" for the loss of his job.[95]

The Court held that "Thomas cannot be denied the benefits due him on the basis of the findings . . . that he terminated his employment because of his religious convictions."[96] The fact that some Jehovah's Witnesses might have had a different view of which work requirements were religiously proscribed did not invalidate Thomas's view. "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differ-

87. *Id.* at 401 ("The appellee Employment Security Commission . . . found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept 'suitable work when offered . . . .'").

88. *Id.* at 404.

89. *Id.* at 410.

90. *Id.* at 409–10.

91. 450 U.S. 707 (1981).

92. *Id.* at 709 ("Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks.").

93. *Id.* ("He claimed his religious beliefs prevented him from participating in the production of war materials.").

94. *Id.* at 711 ("[H]e consulted another Blaw-Knox employee—a friend and fellow Jehovah's Witness [who] . . . advised him that working on weapons parts at Blaw-Knox was not 'unscriptural.'").

95. *Id.* at 712 ("The referee concluded nonetheless that Thomas' termination was not based upon a 'good cause [arising] in connection with [his] work,' as required by the Indiana unemployment compensation statute." (alterations in original)).

96. *Id.* at 720.

ences in relation to the Religion Clauses."[97] While not ruling out that certain claimed religious views might be considered beyond the pale,[98] the Court made clear both that the claim in the instant case was not one of those[99] and that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect."[100] Where the asserted beliefs are sincerely held[101] and are not "so bizarre"[102] as to fail to trigger First Amendment protection, the state is limited with respect to the conditions it can place on people's actions based on religious faith.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.[103]

Both *Sherbert* and *Thomas* suggest that the state cannot condition unemployment benefits upon an individual's sacrificing his or her sincere religious beliefs by working.[104] However, in *Employment Division v. Smith*,[105] the Court suggested that those cases do not provide robust protections to conscience-based action extending beyond the unemployment benefits context.[106] The *Smith* Court noted that the "'exercise of religion' often involves . . . the performance of (or abstention from) physical acts,"[107] and explained that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions *only* when they are engaged in for religious reasons, or *only* because of the religious belief that they display."[108] Thus, a state runs afoul of constitutional protections if it prohibits a practice *because* it is performed for religious reasons. However, a practice that is prohibited *whether or not* performed for religious reasons does not violate those free exercise guarantees.[109]

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97. *Id.* at 715.

98. *Id.* ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . .").

99. *Id.* ("[T]hat is not the case here . . . .").

100. *Id.* at 716–17.

101. *Cf.* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Religious experiences which are as real as life to some may be incomprehensible to others.").

102. *Thomas*, 450 U.S. at 715.

103. *Id.* at 717–18.

104. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc. (2014), *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651, 1655–56 (2011).

105. 494 U.S. 872 (1990).

106. *See id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

107. *Id.* at 877.

108. *Id.* (alteration in original) (emphases added) (quoting U.S. CONST. amend. I).

109. *See id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes

Thus, on the Court's interpretation, while regulations targeting religious activity will be struck down absent compelling justification,[110] there is no "constitutional right to ignore neutral laws of general applicability."[111]

Smith has been roundly criticized,[112] although it has never been overruled.[113] Yet, even without *Smith*, the Court has not afforded conscience great constitutional protection, as *Gillette* illustrates.[114] Conscience, then, does not seem likely to yield a generalized exemption to the requirements of neutral laws in the commercial context. Nonetheless, because it might be argued that the First Amendment protects conscience-based refusals to provide goods or services out of respect for the freedom of association (and non-association), the Court's association jurisprudence must also be examined.

D. Rights of Association

In *Roberts v. United States Jaycees*,[115] the Court explained that there is "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[116] At issue was the refusal of the United States Jaycees to permit the local St. Paul and Minneapolis chapters to admit women as regular members.[117] After having been notified that their charters might be revoked, "both [local] chapters filed charges of discrimination with the Minnesota Department of Human Rights [alleging] that the exclusion of women from full membership, required by the national organization's bylaws, violated the Minnesota Human Rights Act (Act)."[118] The national organization claimed that

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(or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

110. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." (citation omitted) (citing *Smith*, 494 U.S. at 878–79)).

111. City of Boerne v. Flores, 521 U.S. 507, 513 (1997).

112. Marci A. Hamilton, *Political Responses to Supreme Court Decisions*, 32 HARV. J.L. & PUB. POL'Y 113, 121 (2009) ("Another broadly criticized Supreme Court decision is a religion case, *Employment Division v. Smith* . . . .").

113. Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 497 (1998) ("*Employment Division v. Smith* is still good law, despite its many critics.").

114. *See supra* notes 76–82 and accompanying text.

115. 468 U.S. 609 (1984).

116. *Id.* at 618.

117. *Id.* at 614 ("In 1974 and 1975, respectively, the Minneapolis and St. Paul chapters of the Jaycees began admitting women as regular members. Currently, the memberships and boards of directors of both chapters include a substantial proportion of women. As a result, the two chapters have been in violation of the national organization's bylaws for about 10 years. The national organization has imposed a number of sanctions on the Minneapolis and St. Paul chapters for violating the bylaws, including denying their members eligibility for state or national office or awards programs, and refusing to count their membership in computing votes at national conventions.").

118. *Id.*

the members' constitutionally protected right to association was violated by the Minnesota law.[119]

The *Roberts* Court explained that although the national organization and the local Jaycees chapters did distinguish on the basis of "age and sex,"[120] they were "large and basically unselective groups."[121] Lack of selectivity notwithstanding, the Court nonetheless noted that there "can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[122] After all, a required modification of membership might "impair the ability of the original members to express only those views that brought them together."[123] That said, however, there was no claim that the Act was being applied against the Jaycees to modify their message.[124]

The *Roberts* Court minimized the burden that would be placed on the Jaycees were they forced to admit women as regular members.[125] While it was possible that some "women members might have a different view or agenda"[126] than would some men members, the Court was unwilling to credit such a claim absent more support in the record.[127] For example, the Court was not confident that women would have a different viewpoint "about such issues as the federal budget, school prayer, voting rights, and foreign relations."[128] Finally, even if the Act's enforcement "causes some incidental abridgment of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes."[129] For this reason and because of the importance of the state's interest, the Court rejected the Jaycees' association claims.[130]

In her *Roberts* concurring opinion, Justice O'Connor emphasized an aspect of the case that the Court did not explore. The Jaycees had been construed as a business "in that it sells goods and extends privileges in

119. *Id.* at 612 ("This case requires us to address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization.").

120. *Id.* at 621.

121. *Id.*

122. *Id.* at 623.

123. *Id.*

124. *Id.* at 624 ("Nor does the Jaycees contend that the Act has been applied in this case for the purpose of hampering the organization's ability to express its views.").

125. *See id.* at 626 ("[T]he Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984))).

126. *Id.* at 627.

127. *Id.* (noting that the change in view claim was not "supported by the record").

128. *Id.* at 627–28.

129. *Id.* at 628.

130. *See id.* at 623 ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

exchange for annual membership dues."[131] She questioned the Court's apparent position that "the Jaycees' right of association depends on the organization's making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.'"[132] Her fear was that "certain commercial associations, by engaging occasionally in certain kinds of expressive activities, might improperly gain protection for discrimination."[133] Justice O'Connor believed that the *Roberts* majority opinion might be interpreted to grant commercial entities more constitutional protection than they actually have, because the "Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State."[134] Thus, in her view, commercial organizations simply do not enjoy the same kinds of associational freedoms as do noncommercial organizations, and the Court having used the same approach in this commercial context as it would have used in a noncommercial context might mislead lower courts with respect to the proper approach to be taken in such cases, correct result in this particular case notwithstanding.

Basically, Justice O'Connor linked the protections afforded by the Constitution to the kind of entity seeking protection. When an entity "enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."[135] Entities primarily engaged in commerce simply do not enjoy the protections that other entities might enjoy.[136]

In the aforementioned cases, the Court has spelled out First Amendment protections against state-required speech. The state cannot require individuals to affirm principles in which they do not believe. Symbolic conduct is not afforded the same degree of protection as is pure speech, however, and the Court has given mixed signals with respect to the degree of protection afforded to conscience-based activity. The next section examines Supreme Court cases that have explored the degree to which the First Amendment affords protection when claims involving discrimination on the basis of sexual orientation are at issue.

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131. *Id.* at 616.

132. *Id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Roberts*, 468 U.S. at 626–27 (majority opinion)).

133. *Id.*

134. *Id.* at 634.

135. *Id.* at 636.

136. A separate issue involves the degree to which the First Amendment protects corporate political speech. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 315 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

III. ORIENTATION DISCRIMINATION AND THE FIRST AMENDMENT

First Amendment guarantees involving expression, association, and free exercise have been implicated in cases involving discrimination on the basis of sexual orientation. The Court has not been consistent with respect to the proper approach when constitutional values come into conflict, although the cases do suggest that commercial entities cannot immunize discriminatory practices by asserting First Amendment guarantees.

A. Compelled Speech

The United States Supreme Court addressed the conflict between First Amendment and equal protection values in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB)*.[137] At issue was whether First Amendment guarantees permitted those organizing the annual Saint Patrick's Day Parade, the South Boston Allied War Veterans Council, to preclude GLIB from marching in the parade.[138] GLIB was formed so that its members could march "in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants."[139] The parade organizers did not want the group to march in the parade, although the reason for the exclusion was unclear.[140] Differing reasons for the exclusion were offered at different times during the trial,[141] and the trial court found that the reasons proffered were not the real reasons anyway.[142]

Perhaps because of the difficulty associated with determining the organizers' actual reasons, the Court decided to discuss some of the reasons that *might* have motivated the parade organizers. The Court reasoned that a GLIB "contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual."[143] In addition, permitting GLIB to march might be perceived as lending support to GLIB's "view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around oth-

137. 515 U.S. 557 (1995).

138. *Id.* at 559–60.

139. *Id.* at 570.

140. For example, the trial court judge had found that the exclusion was based on the group members' sexual orientation. *See* Irish-American Gay, Lesbian & Bisexual Grp. of Bos. (*GLIB*) v. City of Bos., 636 N.E.2d 1293, 1295 (Mass. 1994) ("The judge found that GLIB was excluded from the parade because of the sexual orientation of its members."), *rev'd*, *Hurley*, 515 U.S. 557 (1995). There had been testimony that the group had been excluded because of the unsubstantiated belief that the group's members were also members of Act-Up and Queer Nation and that they might become disorderly. *Id.* at 1295 n.8.

141. *Id.* at 1295 ("At trial, Hurley 'equivocated about his reasons for excluding GLIB' but ultimately testified that he would never allow them to march in the parade.").

142. *Id.* ("The judge concluded that the inconsistent and changing explanations for excluding GLIB demonstrated the 'pretextual nature' of those explanations.").

143. *Hurley*, 515 U.S. at 574.

er identifying characteristics."[144] The march organizers might have had a different view; for example, they "may not [have] believe[d] these facts about Irish sexuality to be so."[145] Or, even if the organizers realized that some GLIB members were of Irish descent, the organizers might nonetheless have "object[ed] to unqualified social acceptance of gays and lesbians or [might] have some other reason for wishing to keep GLIB's message out of the parade."[146] Perhaps the Council feared that permitting GLIB to participate would be perceived as a Council endorsement that GLIB's "message was worthy of presentation and quite possibly of support as well."[147]

The Supreme Judicial Court of Massachusetts had held that GLIB must be included in the parade.[148] That holding was based in part on a finding that the parade had no expressive purpose,[149] both because so many divergent viewpoints were represented in the parade[150] and because of the Council's nonselectivity—"in essence, almost any individual or group would be admitted to the parade if they either apply or show up at the start of the parade and offer to make a contribution to the council."[151] Indeed, the trial judge had found that "since 1947 the only groups that have been excluded from the Parade besides GLIB have been the Ku Klux Klan and ROAR (Restore our Alienated Rights) [an anti busing group]."[152]

The United States Supreme Court rejected the approach taken by the Supreme Judicial Court of Massachusetts, explaining that "the word 'parade' . . . indicate[s] marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[153] In this case, it was not entirely clear what that point was, since "the Council [was] rather lenient in admitting participants."[154] Nonetheless, the lack of a clearly defined message did not mean that there was no message at

144. *Id.*
145. *Id.*
146. *Id.* at 574–75.
147. *Id.* at 575.
148. *Id.* at 563–64.
149. *See id.* at 564 (discussing the Massachusetts court's view that "it was impossible to detect an expressive purpose in the parade"); *see also GLIB*, 636 N.E.2d 1293, 1300 (Mass. 1994) ("[T]here was no error in his finding that the parade was not used by the council for expressive purposes, and that, as a result, the defendants could not cloak their discriminatory acts in the mantle of the First Amendment."), *rev'd*, *Hurley*, 515 U.S. 557 (1995).
150. *See GLIB*, 636 N.E.2d at 1296 n.9.
151. *Id.* at 1298.
152. *Id.* at 1296. *But see id.* at 1296 n.10 (noting the council's claim that "the Massachusetts Right to Life group and a truck carrying antihomosexual signs also were excluded").
153. *Hurley*, 515 U.S. at 568.
154. *Id.* at 569; *see also GLIB*, 636 N.E.2d at 1296 (noting the trial court's finding that there were "no written procedures, criteria, or standards for selecting participants or sponsors of the parade").

all.[155] Further, even if there was no particular message that the Council wished to express, there may have been messages that the Council wished to refrain from expressing.[156] The Court explained that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[157]

Certainly, there are other ways for speakers to disassociate themselves from particular messages. For example, individuals may post signs disavowing approval or disapproval of a particular position,[158] although "such disclaimers would be quite curious in a moving parade."[159] Not only was there "no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants" in a parade like this,[160] but choosing to do this for one marcher in the parade would raise questions about which other views were implicitly being authorized or disavowed. Thus, if there were someone marching immediately in front of GLIB disavowing the inference that the Council agreed or disagreed with any particular group's message, then bystanders might wonder whether that meant that the Council was implicitly endorsing all of the other groups or, perhaps, was also disavowing the messages of those groups following GLIB.

The Council could instead have had someone marching at the head of the parade holding a disclaimer sign indicating that the views expressed by individual marchers did not necessarily reflect those of the organizers. That way, there would be no implication that the disclaimer applied to one marching group in particular. However, such a disclaimer might well be missed by parade watchers who arrived late or were momentarily distracted, thereby undermining the disclaimer's intended effect.[161]

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155. *Hurley*, 515 U.S. at 569–70 ("But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.").

156. *See id.* at 573 ("[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid . . . ." (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995))).

157. *Id.* at 576.

158. *Cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) ("[A]ppellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.").

159. *Hurley*, 515 U.S. at 576–77.

160. *Id.* at 576.

161. *Cf.* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

The *Hurley* Court emphasized that noncommercial speech was at issue,[162] and treated the restriction as "amount[ing] to nothing less than a proposal to limit speech in the service of orthodox expression."[163] Such a proposal was incompatible with First Amendment protections.[164] Because parades are not only "a form of expression"[165] but also have "inherent expressiveness,"[166] and because "the Council clearly decided to exclude a message it did not like from the communication it chose to make,"[167] the First Amendment precluded Massachusetts from forcing a private group to change its message by requiring GLIB's message to be expressed.

While a straightforward reading of *Hurley* is that the First Amendment precludes the state from forcing private entities to modify their message absent compelling justification, there are other ways to read the opinion. For example, *Hurley* might be read as permitting or even endorsing orientation-based animus.[168] Because virtually no other groups had been excluded from marching in the parade, the Court's upholding this exclusion might be read to suggest that the Court believed that there was something peculiarly objectionable about this particular group.[169] Whether orientation was appropriately subject to disadvantageous treatment was one of the issues discussed in *Romer v. Evans*.[170]

B. Orientation and Association

While *Romer* was decided on equal protection grounds,[171] the state had asserted the protection of association rights as a justification for the ballot measure.[172] At issue was a Colorado amendment designed to withdraw antidiscrimination protections on the basis of sexual orientation.[173]

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162. *Hurley*, 515 U.S. at 579 ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . .").

163. *Id.* ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment . . . .").

164. *Id.* ("The Speech Clause has no more certain antithesis.").

165. *Id.* at 568.

166. *Id.*

167. *Id.* at 574.

168. *See* Catherine Connolly, *Gay Rights in Wyoming: A Review of Federal and State Law*, 11 WYO. L. REV. 125, 135 n.57 (2011) (reading *Hurley* to "permit discriminatory animus regarding LGBT individuals and groups"). *See also* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2459 (1997) ("More realistically, there is no reason to believe the Council ever had a message, and some reason to think they were simply excluding GLIB because of antihomosexual animus . . . .").

169. *Cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000) ("[T]he purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude *certain* participants nonetheless." (emphasis added)).

170. 517 U.S. 620, 626 (1996).

171. *Id.* at 635–36 ("Amendment 2 violates the Equal Protection Clause . . . .").

172. *Id.* at 635.

173. The amendment was titled "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation" and provided as follows:

The Court noted that the "amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[174]

When striking down the amendment, the Court reasoned that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[175] The state had sought to justify the amendment by saying that it represented "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[176] In rejecting that this purpose could justify the amendment's enactment, the Court reasoned that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[177]

In his dissent, Justice Scalia argued that sexual orientation not only could "be singled out for disfavorable treatment,"[178] but also that it already had been in *Bowers v. Hardwick*.[179] Even worse in Justice Scalia's eyes was the Court's implicit message that "opposition to homosexuality is as reprehensible as racial or religious bias."[180] Rather than contest that the amendment was animus-based, Justice Scalia instead dissented from the proposition that "'animosity' toward homosexuality is evil."[181] He would have upheld the amendment precisely because it was allegedly based on "moral disapproval of homosexual conduct."[182]

Romer seems to stand for the proposition that orientation-based animus, whether understood as "a Kulturkampf"[183] or, instead, "a fit of spite,"[184] does not survive even rational basis review.[185] However, such a

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> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. at 624 (quoting COLO. CONST. art. II, § 30b, *held unconstitutional by* Romer v. Evans, 517 U.S. 620 (1996)).

174. *Id.* at 627.

175. *Id.* at 634.

176. *Id.* at 635.

177. *Id.*

178. *Id.* at 636 (Scalia, J., dissenting).

179. *See id.* ("[T]he Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . ." (citing Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003))).

180. *Id.*

181. *Id.*

182. *Id.* at 644.

183. *See id.* at 636. For a brief definition of Kulturkampf, see Jeffrey M. Shaman, *Justice Scalia and the Art of Rhetoric*, 28 CONST. COMMENT. 287, 290 n.19 (2012) ("'Kulturkampf' translates literally as 'culture struggle.' The phrase was originally used as a political slogan in reference to the ongoing struggle that occurred in the 1870s between the Roman Catholic Church and the German government for control over school and church appointments and civil marriage.").

184. *See Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

conclusion might have been thought premature[186] after the Court issued *Boy Scouts of America v. Dale*[187] five years later.

At issue in *Dale* was whether the Boy Scouts had violated New Jersey's public accommodation law[188] when precluding James Dale from being a scoutmaster once the organization had discovered that he was gay.[189] The *Dale* Court reasoned that the "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[190] After finding that "the Boy Scouts [of America] engages in expressive activity,"[191] the Court set out to determine whether the inclusion of Dale would modify the Scouts' message. The Court explained, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."[192] Yet, the *Roberts* Court had refused to defer to the Jaycees about what would impair that organization's message,[193] so the Court's commitment to deference was hardly as established as the *Dale* Court had implied.

The *Dale* Court denied that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[194] Such a denial would seem to have disposed of the case, because Monmouth Council Executive James Kay had expressly stated in writing

185. *See id.* at 635 (majority opinion) ("We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective."); *see also* Anthony Michael Kreis, Lawrence *Meets Libel: Squaring Constitutional Norms with Sexual-Orientation Defamation*, 122 YALE L.J. ONLINE 125, 137 (2012) ("*Romer v. Evans* was the Supreme Court's first authoritative statement that the entanglement of state action with anti-LGBT animus is constitutionally impermissible.").

186. Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 610–11 (2001) ("Dale sanctioned the marginalization of gay people through the First Amendment . . . . Some have called anti-gay animus the last socially acceptable form of prejudice existing today.").

187. 530 U.S. 640 (2000).

188. *Id.* at 644 ("The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale.").

189. *Id.* ("Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual . . . ."); *see also id.* at 645 ("Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts 'specifically forbid membership to homosexuals.'").

190. *Id.* at 648 (citing N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988)).

191. *Id.* at 650.

192. *Id.* at 653 (citing Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123–24 (1981)).

193. *See* James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1471 (2004) ("Nor did Brennan's opinion for the Court in *Roberts* do what Rehnquist's opinion for the Court subsequently did in *Boy Scouts*: simply defer to the Jaycees' claims that being forced to admit women would impair their expression or impede their ability to disseminate their views or message.").

194. *Dale*, 530 U.S. at 653.

that the Boy Scouts "specifically forbid membership to homosexuals."[195] This meant that Dale's orientation rather than the fact that he had been a co-president of a gay and lesbian organization while at college[196] was the decisive factor. For example, his Scouts membership presumably would not have been revoked if he had been straight and a co-president of a Gay-Straight Alliance.[197] Nonetheless, the Court held that the New Jersey public accommodations law violated the Boy Scouts' "rights to freedom of expressive association."[198]

The Court's position became even more confused and confusing when it cited *Hurley* for support, explaining that the Saint Patrick's Day Parade organizers "did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."[199] After distinguishing between an orientation-based and a message-based exclusion, the *Dale* Court continued,

> As the presence of GLIB in Boston's St. Patrick's Day [P]arade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.[200]

But it was not as if Dale was carrying a banner saying that he was gay or even saying that he supported gay rights. Rather, he was being rejected because he was gay. Ironically, Dale could have marched in the Saint Patrick's Day Parade (as long as he marched, say, with the ACLU rather than with GLIB), but could not be an assistant scoutmaster.

Suppose that a straight man actively supported gay rights. He, too, would not be permitted to be a scoutmaster if he expressed that position to the youth in his troop.[201] Dale had not been accused of having said anything inappropriate to the Scouts, however, so such a point was not relevant to the case at hand.[202]

The *Dale* Court implied that because Dale was a gay rights activist outside of the Scouts,[203] permitting him to be a scout leader would impair the Boy Scouts' message. But suppose a straight scout leader advocated

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195. *Id.* at 645 (internal quotation marks omitted).

196. *See id.* at 653.

197. *See* Mark Strasser, *Leaving the* Dale *to Be More* FAIR*: On* CLS v. Martinez *and First Amendment Jurisprudence*, 11 FIRST AMEND. L. REV. 235, 267 (2012) ("[H]ad Dale been President of a Gay-Straight Alliance at Rutgers, he could have continued to be a Scout leader as long as he self-identified as having a different-sex orientation.").

198. *Dale*, 530 U.S. at 659.

199. *Id.* at 653.

200. *Id.* at 654.

201. *See id.* at 655 n.1.

202. *See id.* at 689 (Stevens, J., dissenting) ("BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop . . . .").

203. *Id.* at 653 (majority opinion) ("Dale . . . remains a gay rights activist.").

for gay rights outside of the Scouts. Permitting that person to be a Scout would presumably impair the Boy Scout message as well, although the Scouts would not have expelled such a person.[204]

The *Dale* Court understood that the Boy Scouts' willingness to continue to employ a straight man dissenting from their sexual orientation policy would seem to undercut their alleged worry about keeping employees on message. But the Court was unpersuaded that the Scout's willingness to employ a straight supporter of gay rights established that the organization was discriminating on the basis of orientation. "The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."[205] The Court conveniently ignored the Boy Scouts' express admission that it would prohibit non-activists who were gay from being scoutmasters[206] and that it would permit activists who were not gay to be scoutmasters. The Court's emphasis on message rather than orientation was both disingenuous[207] and unpersuasive.[208]

The *Dale* analysis is "disappointing,"[209] at least in part, because the Court treated the Boy Scouts' policy as if it only precluded gay activists from being members when it expressly discriminated on the basis of orientation. An additional noteworthy element of the *Dale* opinion is that the Court deferred to the Boy Scouts' assessment of whether its message would be altered by permitting a nondesired person to be a member when the Court had not been at all deferential in *Roberts*. One explanation for the differing degree of deference in the two cases is to say that the Court disapproved of discrimination on the basis of sex[210] but approved of discrimination based on orientation,[211] although a different explanation emphasizes that the Jaycees were viewed as commercial and the Boy Scouts

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204. *Id.* at 691 n.19 (Stevens, J., dissenting).

205. *Id.* at 655–56 (majority opinion).

206. *See supra* note 195 and accompanying text (noting that "homosexuals" could not be Scouts).

207. *See* Suzanna Sherry, *Warning: Labeling Constitutions May Be Hazardous to Your Regime*, 67 LAW & CONTEMP. PROBS. 33, 39 (2004) ("[T]here is the disingenuous way in which the Court identified both the organization's message and the effect that retaining Dale as a scoutmaster would have on that message.").

208. *Cf.* Strasser, *supra* note 197, at 268 ("*Dale* modifies right to association jurisprudence while claiming to follow it.").

209. *See* Scott Kelly, Note, *Scouts' (Dis)Honor: The Supreme Court Allows the Boy Scouts of America to Discriminate Against Homosexuals in* Boy Scouts of America v. Dale, 39 HOUS. L. REV. 243, 244 (2002).

210. *Cf.* James A. Davids, *Enforcing a Traditional Moral Code Does Not Trigger a Religious Institution's Loss of Tax Exemption*, 24 REGENT U. L. REV. 433, 440 (2012) ("Regarding the judicial branch, someone arguing that prohibiting gender discrimination is a 'fundamental national public policy' would undoubtedly start with *Roberts v. United States Jaycees*.").

211. *See* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 631, 637 (2011) (describing *Hurley* and *Dale* as "recent First Amendment decisions from the U.S. Supreme Court that favored discrimination against gays over nondiscrimination").

were not.[212] Yet another explanation is that the Court had a change of heart and now believed that great deference was due to an organization's judgment about when its own message might be altered. The deference-to-the-organization's-judgment explanation was subsequently refuted in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[213]

At issue in *FAIR* was the constitutionality of the Solomon Amendment,[214] which specified that "if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."[215] FAIR, an association of law schools and law faculties,[216] "argued that this forced inclusion and equal treatment of military recruiters violated the law schools' First Amendment freedoms of speech and association."[217]

At the time, the military banned gays from serving in the armed forces.[218] Because FAIR members had "adopted policies expressing their opposition to discrimination based on, among other factors, sexual orientation,"[219] law schools were put in a bind. They had "to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities."[220]

The Court suggested both that "Congress has broad authority to legislate on matters of military recruiting"[221] and that Congress could have directly imposed access requirements had it so desired.[222] The Court then reasoned that because Congress could have imposed the requirement directly, it obviously was permitted to adopt the indirect method that it in fact chose.[223] But this reasoning is incorrect if only because the First Amendment may be implicated in one method but not in the other. If Congress had directly imposed such a requirement, then it would be unlikely that students would impute the discriminatory policy to the University.[224] If, however, a university chose to ignore its own policy so that

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212. *See* Fleming, *supra* note 193, at 1472 ("[O]ne might argue that there is a difference in the character of the freedom of association: that the Jaycees were engaged in commercial association, while the Boy Scouts were involved in civic association . . . .").

213. 547 U.S. 47 (2006).

214. *Id.* at 51 ("The law schools responded by suing, alleging that the Solomon Amendment infringed their First Amendment freedoms of speech and association.").

215. *Id.*; *see* 10 U.S.C.A. § 983 (West 2013).

216. *FAIR*, 547 U.S. at 52.

217. *Id.* at 53.

218. *See id.* at 52 n.1 ("[A] person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex.").

219. *Id.* at 52.

220. *Id.* at 53.

221. *Id.* at 58.

222. *Id.* at 60 ("[T]he First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement . . . .").

223. *See id.*

224. Ironically, the Court recognized this point but somehow believed that it cut the other way. *See id.* at 65 ("We have held that high school students can appreciate the difference between speech

it would not lose federal funds, then the university would be more likely to have a message imputed to it, e.g., that it did not take its own nondiscrimination policy seriously,[225] depending perhaps upon how much money was at stake.[226]

The *FAIR* Court was not at all deferential to the law schools' judgment that they were being forced to support a message with which they disagreed—the Court simply announced that "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."[227] The Court explained, "Nothing about recruiting suggests that law schools agree with any speech by recruiters,"[228] notwithstanding that nonmilitary recruiters with a similar policy would not have been allowed to recruit on campus.[229]

To support the claim that law schools were not being forced by the Solomon Amendment to modify their own messages, the *FAIR* Court emphasized that "nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."[230] Thus, a school could post a sign saying that the military's policy should not be attributed to the school or, perhaps, that the school affirmatively disagreed with the military's discriminatory policy. But suppose that the law school did not believe that such signs would be effective.[231] That did not matter, because the law schools were mistaken in thinking that they were being forced to speak at all—"accommodating the military's message does not

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a school sponsors and speech the school permits because legally required to do so . . . ." (citing Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion))).

225. Some commentators seem not to appreciate that the fact that a university has a choice makes it more rather than less likely that a message will be imputed to it based on the choice made. *See* James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 988 (2011) (reasoning that an important distinction between *FAIR* and cases where public accommodations laws require compliance "is that schools had a choice to continue their educational mission without interference by simply forfeiting federal funding").

226. *Cf.* Major Charles G. Kels, *Free Speech and the Military Recruiter: Reaffirming the Marketplace of Ideas*, 11 NEV. L.J. 92, 127 (2010) ("FAIR called the amount of money at stake—an estimated $400 million annually in the case of Harvard University—'a fiscal gun at the University's head.'" (footnote omitted)); John Curran, *Vt. Law School to Accept Military Recruiters*, TIMES ARGUS (MONTPELIER-BARRE, VT.), Aug. 15, 2011 ("Vermont Law School and . . . the William Mitchell College of Law . . . were the only ones in America that barred the recruiters despite a measure known as the Solomon Amendment . . . . Both are independent law schools unaffiliated with larger universities or state institutions, which allowed them to stand on principle without costing affiliated schools millions of federal dollars for scientific research and other academic pursuits.").

227. *FAIR*, 547 U.S. at 64.

228. *Id.* at 65.

229. *Cf. id.* at 58 ("It is insufficient for a law school to treat the military as it treats all other employers who violate its nondiscrimination policy. Under the statute, military recruiters must be given the same access as recruiters who comply with the policy.").

230. *Id.* at 65.

231. *Cf. supra* notes 158–61 and accompanying text (discussing why a disavowal might not be effective in the context of a parade).

affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[232]

The *FAIR* Court also addressed whether "the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection."[233] Citing *O'Brien*, the Court noted that "some forms of 'symbolic speech' [a]re deserving of First Amendment protection,"[234] but then reaffirmed its rejection of "the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'"[235] Instead, the "First Amendment [extends] protection only to conduct that is inherently expressive."[236]

An important question, then, is which behaviors are inherently expressive. The Court explained why the conduct at issue did not qualify. "An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else."[237] The observer would not know that the law school was making a statement by having the recruiting elsewhere unless the law school had made a statement about it.[238] "The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*."[239] Nor should it be thought that combining speech with conduct would transform the conduct into expression. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."[240] Furthermore, there would be undesirable consequences if expressive conduct were viewed more expansively. For example, "if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, [the Court] would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment."[241] Needless to say, the Court would not treat such a protest as expressive conduct.[242] Nor for that matter has the Court been willing to recognize a constitutional right to avoid

232. *FAIR*, 547 U.S. at 64.
233. *Id.* at 65.
234. *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968) (internal quotation marks omitted)).
235. *Id.* at 65–66 (quoting *O'Brien*, 391 U.S. at 376).
236. *Id.* at 66.
237. *Id.*
238. *Id.* ("The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it.").
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*

paying taxes even if doing so violates sincerely held religious beliefs.[243] In *United States v. Lee*,[244] the Court explained, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[245]

The *FAIR* Court also addressed whether the Solomon Amendment "violates law schools' freedom of expressive association."[246] Dispensing with that challenge rather quickly, the Court noted that "[s]tudents and faculty are free to associate to voice their disapproval of the military's message."[247] Because that was so, a "military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."[248]

The Court's analysis of First Amendment freedoms in the orientation discrimination context is not free from interpretive difficulty. Sometimes the Court seems to weigh rights to expression and freedom of association more heavily than at other times.[249] Further, the Court has been inconsistent with respect to the degree to which it would give deference to an organization's judgment that unwanted association would change that organization's message. Nonetheless, the Court has embraced at least two principles applicable to the kind of conscience-based activity envisioned in this Article: (1) commercial organizations do not have the same association rights as do noncommercial organizations, and (2) symbolic activity that requires explanation to be understood may well not trigger the First Amendment protections for expressive conduct. The current jurisprudence makes clear how a case like *Elane Photography, L.L.C. v. Willock*[250] should be decided.

C. Elane Photography v. Willock

At issue in *Willock* was a refusal by Elane Photography to photograph the commitment ceremony of Vanessa Willock and her same-sex partner,[251] because the owners did not wish to "convey the message that marriage can be defined to include combinations of people other than the

243. *See infra* notes 244–45 and accompanying text.
244. 455 U.S. 252 (1982).
245. *Id.* at 261.
246. *FAIR*, 547 U.S. at 68.
247. *Id.* at 69–70.
248. *Id.* at 70.
249. *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010) (holding that the University of California, Hastings College of Law could maintain a limited purpose public forum requiring that all student clubs receiving official university recognition admit all students regardless of religion or sexual orientation).
250. 284 P.3d 428 (N.M. Ct. App. 2012).
251. *Id.* at 432 ("This appeal arose from the refusal of Elane Photography, LLC (Elane Photography), to photograph the commitment ceremony of Vanessa Willock (Willock) and her same-sex partner (Partner).").

union of one man and one woman."[252] The New Mexico appellate court hearing the case affirmed the lower court decision that the refusal was in violation of the New Mexico Human Rights Act.[253]

Elane Photography is a commercial enterprise that "primarily photographs significant life events such as weddings and graduations."[254] It advertises "its services through its website, advertisements on multiple search engines, and in the Yellow Pages."[255] Nonetheless, Elane Photography argued that it is not a public accommodation for purposes of the New Mexico law.[256] The appellate court rejected that contention, at least in part, because Elane Photography "advertises its services to the public at large, and anyone who wants to access Elane Photography's website may do so."[257]

Elane Photography denied that it was discriminating on the basis of orientation, arguing that it would have taken portrait photographs of Willock[258] and would have been willing to photograph a different-sex wedding even if one or both of the participants had a same-sex orientation.[259] So, too, Elane Photography might have noted that it would have refused to photograph two straight men or two straight women who wished to commission a commitment ceremony photograph.[260] Yet, such a policy of refusing to photograph two people of the same sex in a commitment ceremony is "directed toward gay persons as a class,"[261] because "the conduct targeted by this law [the NMHRA] is conduct that is closely correlated with being homosexual."[262] Thus, it is unlikely that many straight individuals would wish to participate in a commitment ceremony,[263] and the mere possibility that straight people might desire such a photograph would not undermine that the policy was directed towards those with a same-sex orientation. As a separate matter, the defense to the orientation discrimination claim would be that Elane Photography's refusal to photograph was based on the sexes of the parties, and discrim-

252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 433.
257. *Id.* at 436.
258. *See id.* at 437.
259. *See id.* ("Elane Photography would photograph opposite-sex weddings between persons of any sexual orientation.").
260. *See* Gottry, *supra* note 225, at 984 ("Elane Photography would agree to photograph a traditional wedding between a lesbian woman and gay man, and would refuse to photograph a same-sex commitment ceremony between two straight men.").
261. *Willock*, 284 P.3d at 437 (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring)) (internal quotation mark omitted).
262. *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring); *see also Willock*, 284 P.3d at 437 (quoting *Lawrence*, 539 U.S. at 583).
263. *See* Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 233 (2012) (noting that most "heterosexual men and women . . . would not be tempted to enter a marriage with someone of the same sex").

ination on the basis of sex was also precluded by the New Mexico public accommodations law.[264]

Once determining that the refusal to photograph Willock and her partner was in violation of the law, the New Mexico court then examined whether application of the public accommodations act "violate[d] Elane Photography's freedom of expression protected by the federal and state constitutions."[265] The court noted that "the mere fact that a business provides a good or service with a recognized expressive element does not allow the business to engage in discriminatory practices."[266] Citing *FAIR* for support, the *Willock* court explained that "Elane Photography's commercial business conduct, taking photographs for hire, is not so inherently expressive as to warrant First Amendment protections."[267]

When discussing the degree to which commercial business conduct is expressive, one might focus on whether the good or service itself is "'artistic' and 'personally expressive'"[268] or on the degree to which the refusal to provide the good or service is "inherently expressive."[269] These differing possible points of focus suggest that at least three distinct issues might be addressed when analyzing whether a conscience-exemption policy for commercial entities must be afforded: (1) which goods or services qualify as artistic or personally expressive?; (2) in what ways can conscience-based exemptions be limited without violating constitutional guarantees?; and (3) under what conditions, if any, should the forced provision of a good or service be thought to communicate a message of which the provider disapproves?

1. Goods or Services that Qualify as Artistic or Personally Expressive

The difficulty in applying this criterion is not that commercial photographers fail to engage in artistic or personally expressive work but, rather, that affording an exemption on that basis would be very difficult to cabin. Many individuals (rightly) view their jobs as artistic or personally expressive, because those occupations require the use of judgment or

264. *See Willock*, 284 P.3d at 433.

265. *Id.* at 438.

266. *Id.* at 439 (citing Hishon v. King & Spalding, 467 U.S. 69, 78 (1984)); *cf.* Jennifer Ann Abodeely, Comment, *Thou Shall Not Discriminate: A Proposal for Limiting First Amendment Defenses to Discrimination in Public Accommodations*, 12 SCHOLAR 585, 597 (2010) ("*Hurley* may be distinguished from *Elane Photography* in that the Veterans Council was a private organization engaged in an act of free speech and association, whereas Elane Photography is a business that offers its services to the public.").

267. *Willock*, 284 P.3d at 439.

268. *See* Gottry, *supra* note 225, at 979 ("Elaine is a trained professional photographer who approaches her work with a photojournalist style, which she considers both 'artistic' and 'personally expressive.'").

269. *FAIR*, 547 U.S. at 66.

creativity.[270] Anyone who makes goods might be thought to engage in an artistic endeavor.[271] In addition, a vast array of individuals providing services can plausibly claim that they are also engaged in providing artistic or expressive services. One commentator has suggested that such a policy might result in "endless litigation and factual analysis of what types of businesses are expressive."[272]

Recognizing an exemption to public accommodations statutes for individuals who perform artistic or expressive conduct would likely afford such a wide-ranging exemption that the central purpose behind public accommodation laws—the "elimination of discrimination"[273]—would be severely undermined, if not gutted. While one might believe such a result welcome,[274] those supporting the purposes behind public accommodation laws might well fear that the creation of such an "exception could swallow the general rule."[275]

2. What Counts as Offensive to Conscience

Suppose that an individual claims that her conscience is offended by being forced to do something that she believes promotes a message of which she disapproves. Must such a claim be accepted or are there some claims of conscience that need not be given effect?

The *Thomas* Court suggested that certain religious beliefs are "so bizarre" as not to be afforded constitutional protection.[276] Very few beliefs would fall into that category, however.[277] For example in *United States v. Ballard*,[278] the Court reviewed a mail fraud conviction.[279] The defendants had claimed to have "the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable

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270. *Cf.* Daniel E. Eaton, *Writers Gone Wild: "The Muse Made Me Do It" as a Defense to a Claim of Sexual Harassment*, 12 UCLA ENT. L. REV. 1, 8 n.54 (2004) (discussing "the inherently creative nature of many occupations not generally considered 'creative,' but require the same kind of creative freedom considered indispensable in the arts"); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139 (2000) (noting that "the line between expressive and nonexpressive organizations does not leap out").

271. *See* Nabet, *supra* note 51, at 1550 (discussing "the vast array of artistic businesses that are potentially expressive").

272. *Id.*

273. *Id.* at 1535.

274. *Cf.* Karen L. Dayton, Note, Dale v. Boy Scouts of America: *New Jersey's Law Against Discrimination Weighs the Balance Between the First Amendment and the State's Compelling Interest in Eradicating Discrimination*, 16 GA. ST. U. L. REV. 387, 399 n.101 (1999) ("Tennessee and South Carolina even went so far as to repeal their state public accommodation laws, which left businesses with the complete freedom to choose their customers.").

275. Bailey v. United States, 133 S. Ct. 1031, 1044 (2013).

276. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715 (1981).

277. *See* United States v. Ballard, 322 U.S. 78 (1944). For discussion of *Ballard*, see *infra* notes 278–86 and accompanying text.

278. *Ballard*, 322 U.S. 78 (1944).

279. *Id.* at 79 ("Respondents were indicted and convicted for using, and conspiring to use, the mails to defraud.").

diseases."[280] These "religious doctrines or beliefs"[281] were asserted to convince others to contribute "money, property, and other things of value"[282] to the defendants.

While members of the *Ballard* Court rejected that the defendants actually had the powers in question,[283] the Court held that the Constitution precluded the jury from deciding that issue.[284] The only question that could be submitted to the jury without offending constitutional guarantees was the sincerity of the defendants' beliefs,[285] i.e., whether the defendants sincerely believed that they had the asserted powers. Thus, even the claims at issue in *Ballard* were not sufficiently "bizarre" to fail to trigger First Amendment protection.[286] Further, as the *Thomas* Court made clear, unanimity of belief among sect members is not required for beliefs to qualify as religious and deserving protection.[287]

Some commentators would permit exemptions for individuals for whom providing a service would violate sincerely held religious beliefs but not for individuals for whom providing a service would violate sincerely held moral beliefs.[288] *Seeger* and *Welch* suggest that such a distinction might well be constitutionally problematic.[289] Further, given the great latitude afforded to claims that certain actions contravene sincere religious beliefs, distinguishing between religious and moral compunctions would likely do little if any work, even if constitutionally permissible. An objector could always claim (and might well sincerely believe) that his or her compunctions were religious rather than "merely" moral.

Other commentators equate religious and moral compunctions and suggest that to say that "the owners of Elane Photography can honor their consciences by keeping their moral beliefs out of the marketplace ignores the external orientation of conscience: *conscientia* refers to moral belief

280. *Id.* at 80.

281. *Id.* at 84.

282. *Id.* at 80.

283. *Id.* at 87 ("The religious views espoused by respondents might seem incredible, if not preposterous, to most people."); *id.* at 92 (Jackson, J., dissenting) ("I can see in their teachings nothing but humbug, untainted by any trace of truth.").

284. *See id.* at 86 (majority opinion) ("[W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury.").

285. *Id.* at 91–92 ("[I]t was agreed at the outset of the trial, without objection from the defendants, that only the issue of respondents' good faith belief in the representations of religious experiences would be submitted to the jury. . . . On the issue submitted to the jury in this case it properly rendered a verdict of guilty.").

286. *See* McGowan v. Maryland, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting) ("Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem to some, are within the ambit of the First Amendment.") (citing *Ballard*, 322 U.S. at 87).

287. Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 715–16 (1981).

288. *See* Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 12, 17 (2011). Professor Wilson explained: "[O]ur proposed exemption is limited to religious objections for a reason. I think personally that if we allow exemptions to the celebration of same-sex marriage for moral reasons, that would encompass people having moral objections to homosexuality, which is not something I can support." *Id.*

289. *See id.*; *supra* notes 64–75 and accompanying text.

applied to conduct."[290] But adopting a principle affording a blanket exemption on matters of conscience would recognize a whole host of exemptions unless the principle could be limited in some non-question-begging way. For example, such a justification would permit people to object to a whole host of marriages—interreligious, intergenerational, or interracial marriages—as long as the objectors sincerely believed that such unions violated religious precepts.[291]

Some commentators claim that the way to cabin the exemptions is to refuse to give them effect if there is a moral consensus that the discrimination at issue, e.g., racial discrimination, is wrong.[292] But that means that if there is a moral consensus that orientation discrimination is wrong, then such discrimination will also not be permitted.[293]

In any event, we should not be deciding which dictates of conscience to respect in light of whether there is general agreement with the contents of those beliefs rather than in light of the secular state interests implicated in affording protection to those beliefs.[294] In *School District of Abington Township v. Schempp*,[295] the Court suggested:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[296]

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290. Robert K. Vischer, Commentary, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1405 (2012).

291. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (school denied tax exemption because of its refusal on religious grounds to permit students in interracial relationships to matriculate).

292. *See* Chad Flanders, Book Review, 25 J.L. & RELIGION 567, 570 (2009–2010) (reviewing ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2009)) ("Vischer also says that we have reached a moral consensus that associations should not be able to discriminate on the basis of race but not on whether they should be able to discriminate based on sexual orientation."); *cf.* Abodeely, *supra* note 266, at 589 ("If the facts of the case were different and Elane Photography refused to photograph a Jewish wedding or an interracial wedding, even if those unions were against Huguenin's faith, there would be no question that the business could not legally discriminate based on customers' race or religion.").

293. *Cf.* Flanders, *supra* note 292, at 570–71 (noting that some will disagree with Vischer, presumably with respect to whether a consensus has already been reached that orientation discrimination is unacceptable).

294. *Cf.* McGowan v. Maryland, 366 U.S. 420, 575 (1961) (Douglas, J., dissenting) ("But it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs.").

295. 374 U.S. 203 (1963).

296. *Id.* at 226 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (internal quotation marks omitted)).

The right to act in accord with conscience is not absolute.[297] But the test for whether such conduct is permissible simply cannot be whether it happens to be in accord with majority preferences.[298] It is precisely for this reason that the *Gillette* Court discussed whether there were "valid neutral [secular] reasons"[299] for rejecting a claim of conscience rather than whether there was some consensus about the relative justness of the Vietnam War.[300]

3. When Does the Provision of a Good or Service Constitute Acceptance or Endorsement?

Elane Photography refused to photograph Willock's commitment ceremony because that business did not want to express approval of same-sex marriage.[301] An important issue for the Court has involved the conditions under which particular conduct might be thought to express a view contravening the actor's beliefs. Those cases have ranged from saluting the flag,[302] to displaying something on a license plate,[303] to permitting individuals to be scoutmasters,[304] to permitting the military to interview on campus in contravention of a nondiscrimination policy.[305]

Consider the individual who sees a photographer refusing to photograph a particular couple. The observer would not know whether that refusal was due to a scheduling conflict, an inability to agree about price, or some other reason,[306] especially if there is a public accommodations ordinance requiring commercial establishments not to discriminate. Because it would be unlikely for an observer to impute a particular view to the photographer, the United States Supreme Court would reject that this would be a case of compelled speech, just as the *FAIR* Court rejected that law schools were being compelled to speak.[307] Further, as was true in *FAIR*, taking the photograph would in no way impede Elane Photog-

297. *See* Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) ("[T]he Amendment embraces two concepts, [] freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.").

298. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups . . . ."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2014), *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651, 1655–56 (2011).

299. Gillette v. United States, 401 U.S. 437, 454 (1971).

300. For discussion of *Gillette*, see *supra* notes 76–82 and accompanying text.

301. *See* Gottry, *supra* note 225, at 963–64 (arguing that she was being forced "to communicate a particular message about same-sex commitment ceremonies—was compelled to express a viewpoint she disagreed with, in violation of her First Amendment free speech rights").

302. *See supra* notes 11–25 and accompanying text.

303. *See supra* notes 26–51 and accompanying text.

304. *See supra* notes 187–212 and accompanying text.

305. *See supra* notes 213–49 and accompanying text.

306. Elane Photography, L.L.C. v. Willock, 284 P.3d 428, 439–40 (N.M. Ct. App. 2012) ("[A]n observer who merely sees Elane Photography photographing a same-sex commitment ceremony has no way of knowing if such conduct is an expression of Elane Photography's approval of such ceremonies.") (citing *FAIR*, 547 U.S. 47, 66 (2006)).

307. *FAIR*, 547 U.S. at 64.

raphy from communicating its own views regarding whether same-sex marriage should be permitted in New Mexico.[308] Thus, Elane Photography could post a note on its website that the contents of its photos should not be construed as an endorsement of particular views,[309] although it seems doubtful that any views would be imputed to the photographers even absent such a disclaimer.[310]

Willock had sought to have the commitment ceremony photographed when New Mexico did not recognize same-sex marriage or civil unions.[311] Thus, it was not as if the photograph would be of a wedding. Rather, the difficulty was that the photograph might be thought to represent approval of a same-sex wedding. But if photographing a commitment ceremony—something that was neither a marriage nor a civil union—nonetheless qualifies for an exemption because of what the professional thinks the photograph might symbolize, then any photograph that the photographer believed would somehow communicate the wrong message would justify the photographer's telling the customers to take their business elsewhere.

Professor Wilson suggests that it should be permissible for a variety of individuals—e.g., the baker, the photographer, or the reception hall owner—to refuse to provide wedding services if those individuals have moral qualms about such unions,[312] as long as others are available to provide the service.[313] The same argument would presumably apply to restaurants, hotels,[314] movie theaters, and a whole host of public establishments, because providing service might be construed as symbolic approval. Those who provide flowers or sell clothing might also be in-

308. *Id.* at 65. It is for these reasons that the Court would be unlikely to view this as compelled speech. Some commentators do not appreciate some of the implications of *FAIR*. *See, e.g.*, Nabet, *supra* note 51, at 1542–43 ("In *Elane Photography*, however, application of the New Mexico statute would directly impede Huguenin's ability to disseminate her preferred views; it would force the photographer to affirm and possibly even endorse an ideology that she claims she sincerely believes is wrong.").

309. Gottry, *supra* note 225, at 991 ("Elane Photography would find it even more difficult to distance itself from the message, short of posting a disclaimer on its website, or printing a disclaimer on the photos themselves.").

310. *See supra* notes 301, 306–07 and accompanying text.

311. Douglas Nejaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1201 (2012) ("New Mexico does not offer any relationship recognition to same-sex couples, let alone marriage."); Wilson & Singer, *supra* note 288, at 12 ("New Mexico neither recognizes same-sex marriage nor same-sex civil unions.").

312. *See* Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 328 (2010) ("[A]ssisting with marriage ceremonies has a religious significance that commercial services that are subject to non-discrimination bans, like ordering burgers and hailing taxis, simply do not.").

313. *See* Wilson & Singer, *supra* note 288, at 13.

314. A separate issue involves those who rent out a few rooms in their own homes. For a discussion of those exemptions, see generally David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326 (2012).

cluded.[315] Presumably, dry cleaning establishments, barbershops, and hairdressers might also want not to participate. Grocery stores might wish not to provide goods to those who wish to have in-home celebrations. In short, most if not all businesses would seem permitted to refuse to provide services so that they could avoid sending an undesired message.

Professor Wilson notes that for "many people, marriage itself is a religious sacrament and the assistance of it may well be a religious act in their minds."[316] Yet, those with religious objections to same-sex marriage might also have religious objections to same-sex couples raising children or living together. Or, they might have religious objections to assisting anyone who appears to be undermining traditional gender roles. Presumably, the justification offered in the same-sex wedding context might be used to refuse to provide any services at all to a vast array of individuals for fear of promoting objectionable lifestyles or practices.[317]

IV. CONCLUSION

The Court's analysis of the conditions under which the First Amendment trumps equal protection values has been far from clear. While the Court has been clear that states cannot force individuals to affirm principles contrary to belief, the Court has also been clear that symbolic conduct is not given as much protection as is speech, and that not all conduct that the actor believes is expressive counts as expressive conduct for constitutional purposes. Further, the Court has vacillated with respect to the deference due to an organization's judgment that following the law would alter its message.

Variations in the jurisprudence notwithstanding, some constitutional principles have been articulated consistently. Commercial entities do not have the same constitutional rights as do noncommercial entities, and conduct that does not communicate a message without further explanation may well not even rise to the kind of activity afforded First Amendment protection.

Businesses do not have the constitutional right to choose their customers and should not be afforded that right as a matter of public policy. If they could refuse to provide goods or services as a matter of conscience whenever providing those goods or services were thought to in-

315. *See* Wilson & Singer, *supra* note 288, at 16. Professor Singer notes these implications of Professor Wilson's position. *Id.*

316. *Id.* at 17.

317. Professor Wilson notes that some object to same-sex marriage but not to providing other services. *See* Wilson, *supra* note 312, at 328 ("Many of these people have no objection generally to providing services to lesbians and gays, but they would object to directly facilitating a same-sex marriage."). But for those who object to providing any services to gays or lesbians for religious reasons, one presumes that Professor Wilson would say that should be respected as long as others are available to provide the needed services.

accurately communicate a message of endorsement or, perhaps, tolerance, then such businesses would have been afforded a "carte blanche to discriminate."[318]

Certain kinds of organizations have associational rights that must be respected. But those associational rights do not include the right to refuse to provide commercial products or services to individuals about whom one has religious reservations. Permitting businesses to engage in such discrimination can only cause the country to become more balkanized and individual groups more stigmatized—results that no one should want.

318. *Cf.* Renee M. Williams, Comment, *The Ministerial Exception and Disability Discrimination Claims*, 2011 U. CHI. LEGAL F. 423, 424 (2011) (discussing a case that she interprets to "provide[] religious organizations carte blanche to discriminate").

CHAIDEZ V. UNITED STATES: BREAKING OLD GROUND

ABSTRACT

In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment of the United States Constitution requires defense counsel to advise his or her noncitizen criminal client about the impact of a guilty plea on the client's immigration status. When an attorney fails to provide his or her client that advisement, that client is deprived the effective assistance of counsel guaranteed by the Sixth Amendment. In *Chaidez v. United States*, the Supreme Court held that *Padilla* announced a "new rule" and therefore relief based upon the holding of *Padilla* would only be available prospectively. Defendants whose convictions were final prior to *Padilla*, including Roselva Chaidez, could not bring claims of ineffective assistance of counsel under *Padilla* and were therefore denied justice.

This Comment argues that the holding of *Padilla* was not a new rule. Specifically, changes to immigration law enacted in 1996, not *Padilla*, triggered the right of noncitizen criminal defendants to advisement about the immigration consequences of a guilty plea. Because of these changes, *Padilla* was a straightforward application of the existing *Strickland v. Washington* test for ineffective assistance of counsel, applied to new circumstances created by the 1996 changes in immigration law. Because *Padilla* did not announce a new rule, but only applied an existing rule to new circumstances, the holding should have applied retroactively, and Roselva Chaidez should have had her conviction vacated pursuant to *Padilla*.

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INTRODUCTION

On December 3, 2003, Roselva Chaidez and Jose Padilla faced the same dilemma. Both were lawful permanent residents of the United States.[1] Each had pleaded guilty to a charge without understanding that a guilty plea would result in deportation, as required by United States immigration laws passed in 1996.[2] Neither Chaidez's nor Padilla's attorney had provided their client with advisement about the immigration consequences of her or his plea.[3]

Ten years later, Chaidez and Padilla are in dramatically different situations. A court has vacated Jose Padilla's conviction; although he still faces the underlying criminal charges, he is no longer facing automatic deportation.[4] Roselva Chaidez, on the other hand, is not as fortunate; the Supreme Court refused to recognize her rights and prevent her deportation.[5] These very different results are not due to the factual differences in the cases but rather the result of timing and inconsistent decisions by the Supreme Court.

Three cases are critical to understanding the stories of Roselva Chaidez and Jose Padilla. In *Strickland v. Washington*,[6] the Court set forth the test for determining what constitutes effective or ineffective counsel in a criminal proceeding.[7] *Teague v. Lane*[8] provides the standard

1. Padilla v. Kentucky, 559 U.S. 356, 359 (2010); United States v. Chaidez, 730 F. Supp. 2d 896, 898 (N.D. Ill. 2010), *rev'd*, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).
2. *Padilla*, 559 U.S. at 359; *Chaidez*, 730 F. Supp. 2d at 896.
3. *Padilla*, 559 U.S. at 359; *Chaidez*, 730 F. Supp. 2d at 904; Commonwealth v. Padilla, 253 S.W.3d 482, 483–84 (Ky. 2008), *rev'd and remanded*, 559 U.S. 356 (2010).
4. Padilla v. Commonwealth, 381 S.W.3d 322, 330–31 (Ky. Ct. App. 2012).
5. Chaidez v. United States, 133 S. Ct. 1103, 1113 (2013).
6. 466 U.S. 668 (1984).
7. *Id.* at 687.

for when a rule of criminal procedure applies retroactively.[9] *Padilla v. Kentucky*[10] recognizes a noncitizen criminal defendant's right to advisement about the immigration consequences of a guilty plea.[11]

In *Padilla v. Kentucky*, the United States Supreme Court held that after changes to immigration law enacted in 1996 expanded the number of deportable offenses and nearly eliminated prosecutorial discretion, a criminal defendant has the right to advisement about the immigration consequences of a guilty plea.[12] When a defense attorney fails to provide a criminal defendant accurate information about the deportation ramifications of a guilty plea, the defendant has not received the effective assistance of counsel guaranteed by the Sixth Amendment.[13] A lack of effective assistance of counsel satisfies the first prong of the two-prong *Strickland* test that courts use to determine whether to vacate a criminal conviction.[14]

Following the *Padilla* decision, the federal appellate circuits split on whether the *Padilla* holding retroactively applies to final convictions.[15] The Third Circuit held that the *Padilla* rule applies retroactively, while the Fifth, Seventh, and Tenth Circuits held that it does not.[16] Although the circuits split on whether *Padilla* should apply retroactively, there was unanimity that *Teague* provided the correct standard to apply in making the determination; all of the circuits applied the *Teague* standard regardless of whether deciding either in favor of or against retroactivity.[17] The *Teague* standard appears straightforward: a decision that creates a new rule is generally not retroactive; a decision that applies an old rule to new circumstances is retroactive.[18]

In *Chaidez v. United States*,[19] the Supreme Court resolved the dispute among the circuits by holding that *Padilla* announced a new rule under *Teague*, and therefore did not apply retroactively.[20] The Court held that while the result in *Padilla* came from an ordinary application of the

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8. 489 U.S. 288 (1989).
9. *Id.* at 310.
10. 559 U.S. 356 (2010).
11. *Id.* at 374.
12. *Id.* at 363–64, 374.
13. *See* INS v. St. Cyr., 533 U.S. 289, 323 n.50 (2001); U.S. CONST. amend. VI.
14. *See Padilla*, 559 U.S. at 366–67. The first prong is representation that falls below reasonable professional standards; the second is likelihood of a different outcome absent the deficient representation. *Id.* at 366.
15. Allison C. Callaghan, Comment, Padilla v. Kentucky*: A Case for Retroactivity*, 46 U.C. DAVIS L. REV. 701, 703 (2012).
16. *Id.*
17. United States v. Amer, 681 F.3d 211, 212 (5th Cir. 2012); United States v. Chang Hong, 671 F.3d 1147, 1150 (10th Cir. 2011); Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011); United States v. Orocio, 645 F.3d 630, 635 (3d Cir. 2011), *abrogated by* Chaidez v. United States, 133 S. Ct. 1103 (2013).
18. *See* Teague v. Lane, 489 U.S. 288, 310 (1989).
19. 133 S. Ct. 1103 (2013).
20. *Id.* at 1113.

established *Strickland* test, the decision to apply *Strickland* to any collateral consequence of a conviction broke new ground and created a new rule.[21] Justice Kagan, writing for the majority, noted that *Padilla* "breach[ed] the previously chink-free wall between direct and collateral consequences."[22] This perceived breach was the basis for the *Chaidez* Court's decision that *Padilla* constituted a new rule. The dissent, on the other hand, argued the changes to immigration law in 1996 redefined professional norms for defense counsel.[23] The new professional norms required defense counsel to advise noncitizen clients about the immigration consequences of a guilty plea under existing rules. These new professional norms, in the dissent's view, were new circumstances, not a new rule, and dictated the outcome of the *Strickland* test in *Padilla* making the decision retroactive under *Teague*.

This Comment argues that the dissent in *Chaidez* was correct in determining that the *Padilla* holding did not create a new rule. This Comment further argues that Justice Kagan's wall between direct and collateral consequences never existed in Supreme Court precedent prior to her announcement of the distinction. To the extent it existed in lower court precedent, the wall was not only chinked at the time of the *Padilla* decision but had a gaping hole regarding deportation. Finally, this Comment will argue that Roselva Chaidez had the same right to advisement about the immigration consequences of her guilty plea as Jose Padilla. When the Supreme Court failed to recognize her right to advisement, Roselva Chaidez suffered an injustice, and so did the Bill of Rights.

I. BACKGROUND

Padilla held that the Sixth Amendment requires defense counsel to advise his or her noncitizen criminal client about the impact of a guilty plea on the client's immigration status.[24] In *Chaidez*, the Court held that this duty constituted a new rule as defined by the *Teague* test and therefore was not retroactive.[25] Chaidez, as a result, was not entitled to have her conviction vacated.[26] This ruling is peculiar because Chaidez's guilty plea came over a year after Jose Padilla's conviction. If Jose Padilla had a Sixth Amendment right to information about the deportation consequences of a guilty plea in 2002, how did Chaidez not have the same right in 2003? To comprehend that determination, it is necessary to understand how the Court applied the *Strickland* test in *Padilla* and the importance of the 1996 changes in immigration law.

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21. *Id.* at 1110–11.
22. *Id.* at 1110.
23. *Id.* at 1115 (Sotomayor, J., dissenting).
24. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).
25. *Chaidez*, 133 S. Ct. at 1110–11.
26. *See id.* at 1113.

A. 1996 Immigration Law Changes

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act[27] (IIRIRA) and the Antiterrorism and Effective Death Penalty Act[28] (AEDPA), which increased the number of deportable offenses.[29] Among the changes brought by the 1996 laws was a new definition of "aggravated felony,"[30] specifically, reducing the qualifying sentence from five years to one year.[31] The laws also "abolished the Attorney General's authority to grant discretionary relief from removal for all but a small number of offenses."[32] This meant that noncitizen defendants sentenced to one year or longer of incarceration automatically qualified for deportation.

This new near certainty of deportation led the *Padilla* Court to recognize defense counsel's obligation to advise clients about how a guilty plea could affect their immigration statuses.[33] The Court held that because the new immigration laws made deportation an "integral part . . . of the penalty that may be imposed on noncitizen defendants,"[34] the Sixth Amendment applies to advisement about the deportation consequences of a criminal conviction.[35]

The *Padilla* Court noted that after the 1996 changes in immigration law, it had become the prevailing professional norm for defense counsel to inform a noncitizen client about the ramification of a guilty plea on his or her deportation status.[36] These professional norms are the measuring stick of *Strickland*, and the change in professional norms dictated the outcome of the *Strickland* test in *Padilla*.[37]

B. Strickland v. Washington*: What Constitutes Ineffective Assistance of Counsel?*

The *Strickland* Court established a two-prong test for determining whether to vacate a criminal conviction due to ineffective assistance of

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27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. & 18 U.S.C.).

28. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, & 42 U.S.C.).

29. Matthew A. Spahn, Comment, Padilla *Retroactivity: A Critique of the Tenth Circuit's Ruling That* Padilla v. Kentucky *Does Not Apply Retroactively to Cases on Collateral Review [United States v. Chang Hong, 671 F.3d 1147 (10th Cir. 2011)]*, 51 WASHBURN L.J. 767, 767–68 (2012).

30. Adriane Meneses, Comment, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation as Punishment*, 14 SCHOLAR 767, 782 (2012).

31. *Id.*

32. Chaidez v. United States, 133 S. Ct. 1103, 1116 (2013) (Sotomayor, J., dissenting) (citing Padilla v. Kentucky, 559 U.S. 356, 363–64 (2010)).

33. *Padilla*, 559 U.S. at 363–64.

34. *Id.* at 364.

35. *Id.* at 364, 366.

36. *See id.* at 367.

37. *Id.* at 366–67.

counsel.[38] The first prong examines whether the assistance counsel provided met current professional norms.[39] Assistance of counsel is ineffective when the attorney's performance "falls 'below an objective standard of reasonableness,' as indicated by 'prevailing professional norms.'"[40] The *Strickland* Court identified professional norms as "American Bar Association standards and the like."[41] *Strickland's* second prong determines whether the deficiency in the assistance of counsel caused prejudice significant enough to make a different outcome likely.[42] A petitioner must meet both prongs of the test to have a court vacate a conviction.[43]

When changing professional norms dictate a decision under *Strickland* they establish a new duty for defense counsel without creating a new rule under *Teague*.[44] Over time, the Supreme Court has recognized new standards for the effective assistance of counsel prong of the *Strickland* test.[45] At the same time, the Court frequently holds that changes in professional norms dictate the outcome of the *Strickland* test.[46] In *Wiggins v. Smith*,[47] the Court held that *Williams v. Taylor*,[48] which requires defense counsel to conduct background investigations in certain cases, did not create a new rule.[49] In *Roe v. Flores-Ortega*,[50] the Court held that performance by counsel is ineffective when it deprives a defendant of an appeal.[51] In *Rompilla v. Beard*,[52] the Court found defense counsel to be ineffective because he did not investigate a client's prior convictions.[53] Each time, the Court held that the decision was not a new rule.[54] In each of these cases, the Court held that the professional norms of the time dictated the outcome of the *Strickland* test, that the rules were not new, and therefore the rules applied retroactively.[55]

C. Padilla v. Kentucky *Establishes a New Duty*

Jose Padilla had lived in the United States for over forty years when he pleaded guilty in 2002 to transporting marijuana.[56] He was a Vietnam

38. Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).
39. *Id.*
40. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 687–88 (1984)).
41. *Strickland*, 466 U.S. at 688.
42. *Id.* at 687.
43. *Id.*
44. *Id.* at 784.
45. Spahn, *supra* note 29, at 782–84.
46. *Id.*
47. 539 U.S. 510 (2003).
48. 529 U.S. 362 (2000).
49. Chaidez v. United States, 133 S. Ct. 1103, 1115 (2013) (Sotomayor, J., dissenting).
50. 528 U.S. 470 (2000).
51. *Id.* at 477.
52. 545 U.S. 374 (2005).
53. *Id.* at 389–90.
54. Spahn, *supra* note 29, at 784.
55. *See id.* at 782–84.
56. Padilla v. Kentucky, 559 U.S. 356, 359 (2010); Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd and remanded*, 559 U.S. 356 (2010).

War veteran and lawful permanent resident of the United States.[57] Provisions of the 1996 immigration laws required his deportation as a result of his decision to plead guilty to drug trafficking.[58] After learning he was eligible for deportation, Padilla filed a motion in state court for post-conviction relief based on a Sixth Amendment claim of ineffective assistance of counsel.[59] Padilla claimed his attorney had told him he "did not have to worry about immigration status since he had been in the country so long."[60] Initially, the state trial court denied Padilla's request for relief.[61] Padilla appealed, and the state appellate court reversed the trial court, vacating his conviction.[62] Ultimately, the Kentucky Supreme Court reversed the appellate court and reinstated the trial court order denying relief.[63]

Padilla appealed and the Supreme Court granted certiorari.[64] The Court applied the *Strickland* test, found that Padilla had not received the effective assistance of counsel, and held that a criminal defendant has a Sixth Amendment right to advisement about the immigration consequences of a guilty plea.[65] The Court held that current professional norms required defense counsel to provide information about the immigration consequences of a conviction.[66]

D. Teague v. Lane*: Is a Rule Retroactive?*

Courts use the *Teague* standard to determine when a rule of criminal procedure is retroactive.[67] *Teague* holds that once a conviction is final, a defendant cannot benefit from a subsequent ruling if that ruling announces a new rule.[68] However, if the ruling is merely an established principle applied to new circumstances, it is not a new rule and the decision applies retroactively.[69] The central question faced by the *Chaidez* Court was whether to apply *Padilla* retroactively to Roselva Chaidez's conviction.[70] *Teague* defines a new rule as a decision that "breaks new ground," "imposes a new obligation" on the government, or is "not dictated by [existing] precedent."[71] In order to determine if *Padilla* applied retroactively, the *Chaidez* Court had to determine whether the *Padilla* decision

57. *Padilla*, 559 U.S. at 359.
58. *Id.* at 359, 363–64.
59. *Padilla*, 253 S.W.3d at 483.
60. *Id.* (internal quotation marks omitted).
61. *Id.*
62. *Id.* at 485.
63. *Padilla*, 253 S.W.3d at 485.
64. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).
65. *Id.* at 360, 366, 374.
66. *Id.* at 367.
67. *Id.* at 1107.
68. *Id.*
69. *Id.*
70. Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013).
71. Teague v. Lane, 489 U.S. 288, 301 (1989) (emphasis omitted).

"broke new ground," "imposed a new obligation" on the government, or was "dictated by precedent."

II. *CHAIDEZ V. UNITED STATES*

A. Facts

Roselva Chaidez, originally from Mexico, obtained lawful permanent resident status in the United States in 1977.[72] Approximately twenty years later, she pleaded guilty to two counts of mail fraud for helping to defraud an automobile insurance company.[73] Under the 1996 immigration laws, the two counts to which Chaidez pleaded guilty qualified as "aggravated felonies" and, unbeknownst to Chaidez, triggered her deportation under the 1996 laws.[74] In 2004, Chaidez's convictions became final.[75]

Five years later, Chaidez applied for United States citizenship.[76] Chaidez's application alerted immigration officials of her convictions, and the government initiated deportation proceedings against her.[77] In an attempt to avoid deportation, Chaidez sought to have her convictions vacated by filing a writ of coram nobis with the Federal District Court for the Northern District of Illinois.[78] Chaidez maintained that her attorney never informed her of the immigration consequences of pleading guilty, and at the time of her plea she was unaware of the deportation implications of her plea.[79] Chaidez claimed that her attorney's failure to inform her of the deportation implications of her guilty pleas amounted to ineffective assistance of counsel under the Sixth Amendment.[80] Chaidez filed an affidavit that she would not have accepted the plea bargain if she was aware that she could face deportation as a result.[81] The district court determined this affidavit satisfied the prejudice prong of the *Strickland* test.[82] Chaidez filed her corrected petition for relief with the district court just one week before the Supreme Court decided *Padilla*.[83]

72. *Chaidez*, 133 S. Ct. at 1105.
73. *Id.* at 1105–06.
74. *Id.* at 1106.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. United States v. Chaidez, 730 F. Supp. 2d 896, 904 (N.D. Ill. 2010), *rev'd*, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).
82. *Id.*
83. *Id.* at 898. Chaidez needed to submit a corrected petition explaining why she had waited so long to file. *Id.* at 898, 904.

B. Procedural History

After learning she faced deportation, Chaidez petitioned the district court to have her convictions vacated on Sixth Amendment grounds.[84] The district court ruled that the *Padilla* decision was an ordinary application of *Strickland*, did not break new ground, was not a new rule,[85] and therefore applied retroactively and applied to Chaidez's claim.[86] The district court granted Chaidez's motion and vacated her conviction, finding that Chaidez's attorney had not informed her of relevant deportation issues and that Chaidez's lack of knowledge created prejudice sufficient to believe that the outcome could have been different had the information been provided to Chaidez.[87]

The Government appealed and the Seventh Circuit reversed, finding that *Padilla* did announce a new rule.[88] The Seventh Circuit reasoned that the Supreme Court had never before required defense counsel to advise a client about a collateral consequence of a guilty plea.[89] The Seventh Circuit held that *Padilla* violated the accepted "distinction between direct and collateral consequences."[90] Judge Williams of the Seventh Circuit dissented, arguing that *Padilla* only applied the established *Strickland* test to an attorney's duty to inform a client about deportation issues after the enactment of the 1996 changes in immigration law.[91]

C. Majority Opinion

Justice Kagan wrote the majority opinion for the Court in which Chief Justice Roberts and Justices Scalia, Kennedy, Breyer, and Alito joined.[92] In analyzing whether *Padilla* has retroactive effect, the majority applied the *Teague* standard.[93] Justice Kagan acknowledged that under *Teague*, garden-variety applications of *Strickland* to new circumstances do not produce new rules and are therefore retroactive.[94] However, Justice Kagan determined that *Padilla* was more than a straightforward application of *Strickland*.[95] Justice Kagan argued that before the *Padilla* Court applied *Strickland* it first analyzed whether *Strickland* applied to advisement about deportation, a collateral consequence of conviction.[96] It

84. *Id.* at 898, 904.
85. *Id.* at 904.
86. *Id.*
87. United States v. Chaidez, No. 03 CR 636-6, 2010 WL 3979664, at *3–4 (N.D. Ill. Oct. 6, 2010), *rev'd*, 655 F.3d 684 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013).
88. *Chaidez*, 655 F.3d at 694.
89. *Id.* at 693.
90. Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013) (quoting *Chaidez*, 655 F.3d at 691) (internal quotation marks omitted).
91. *Id.* (citing *Chaidez*, 655 F.3d at 697–99 (Williams, J., dissenting)).
92. *Id.* at 1105.
93. *Id.* at 1107.
94. *Id.*
95. *Id.* at 1108.
96. *Id.*

was this preliminary analysis that Justice Kagan pointed to as breaking new ground under *Teague*, by applying the Sixth Amendment to any collateral consequence of conviction.[97]

Justice Kagan began her analysis by discussing *Hill v. Lockhart*,[98] which extended the Sixth Amendment to the plea process.[99] In that case, the petitioner sought to have his conviction, obtained through a guilty plea, overturned because his counsel provided inaccurate information about parole eligibility.[100] Applying *Strickland* to the petitioner's claim, the *Hill* Court determined that Hill did not meet the second prong of the test; the inaccurate information did not cause him prejudice.[101] Because the petitioner failed to show prejudice, the Court did not determine whether inaccurate information about parole eligibility constituted a violation of the Sixth Amendment guarantee to effective assistance of counsel.[102] Because the *Hill* Court did not determine whether inaccurate advisement about a collateral consequence of conviction, parole eligibility, constituted ineffective assistance of counsel, Justice Kagan did not consider the divide between direct and collateral consequences to have been breached.[103]

Justice Kagan went on to argue that when the *Padilla* Court went through a separate analysis of whether to apply *Strickland* to the issue of advisement about immigration issues, the Court was acknowledging the existence of the collateral distinction.[104] It was this decision to apply *Strickland* to a collateral consequence of conviction—deportation—that Kagan argued broke new ground and created a new rule.[105] The crux of the majority's opinion in *Chaidez* is that prior to *Padilla* the Supreme Court had never applied the Sixth Amendment to any collateral consequence of a guilty plea.[106] In deciding *Padilla*, Justice Kagan wrote, the Court "breach[ed] the previously chink-free wall between direct and collateral consequences."[107]

D. Justice Thomas's Concurring Opinion

Justice Thomas joined in the dissent in *Padilla*.[108] He did not believe that the Sixth Amendment extended any requirements of counsel

97. *Id.* at 1110.
98. *Id.* at 1108 (citing Hill v. Lockhart, 474 U.S. 52 (1985)).
99. *See Hill*, 474 U.S. at 57.
100. *See id.* at 54–55.
101. *Id.* at 60.
102. *See Chaidez*, 133 S. Ct. at 1108.
103. *Id.*
104. *Id.* at 1110.
105. *Id.* at 1110–11.
106. *See id.*
107. *Id.* at 1110.
108. Padilla v. Kentucky, 559 U.S. 356, 388 (2010).

beyond "defense against prosecution of the charged offense."[109] Justice Thomas argued that *Padilla* was wrongly decided. Justice Thomas believed there was no right to advisement about immigration issues for the Court to apply "either prospectively or retrospectively."[110] Because he believed the Court decided *Padilla* incorrectly, Justice Thomas argued that a *Teague* analysis was unnecessary and concurred only in the judgment in *Chaidez*.[111]

E. Dissenting Opinion

Justice Sotomayor authored the dissent in *Chaidez*, which Justice Ginsburg joined.[112] The dissent attacked Justice Kagan's contention that a distinction between direct and collateral consequence existed in Supreme Court precedent.[113] Justice Sotomayor pointed out that many of the lower court cases acknowledging a distinction between direct and collateral consequences were decided prior the passage of IIRIRA in 1996.[114] This is important, Justice Sotomayor argued, because the 1996 laws changed the professional norms regarding advisement about the immigration consequences of a criminal conviction.[115] Justice Sotomayor considered the 2001 decision *INS v. St. Cyr*[116] to be a watershed decision regarding advisement about immigration issues in the context of a criminal proceeding, and noted that after *St. Cyr* a majority of circuit courts began acknowledging defense counsel's duty to inform clients about deportation issues.[117]

The dissent in *Chaidez* argued that applying *Strickland* to the immigration consequences of a conviction did not break new ground.[118] In *St. Cyr*, a case unrelated to the Sixth Amendment, the Court noted that competent criminal defense counsel would advise a client about the deportation consequences of a guilty plea.[119] Justice Sotomayor pointed to appellate court decisions in *United States v. Kwan*[120] and *United States v. Couto*,[121] each of which cited *St. Cyr* in applying *Strickland* to counsel misstatements about the deportation consequences of a guilty plea.[122] In

109. *Chaidez*, 133 S. Ct. at 1114 (Thomas, J., concurring) (quoting *Padilla*, 559 U.S. at 389) (internal quotation mark omitted).
110. *Id.*
111. *Id.*
112. *Id.* at 1114 (Sotomayor, J., dissenting).
113. *See id.* at 1117–18.
114. *Id.* at 1118.
115. *Id.* at 1116.
116. 533 U.S. 289 (2001).
117. *Chaidez*, 133 S. Ct. at 1118 (Sotomayor, J., dissenting).
118. *See id.* at 1120–21.
119. *See id.* at 1111 (majority opinion) (citing *St. Cyr*, 533 U.S. at 323 n.50 (dealing with the retroactivity of IIRIRA and AEDPA)).
120. 407 F.3d 1005 (9th Cir. 2005).
121. 311 F.3d 179 (2d Cir. 2002), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010).
122. *See Chaidez*, 133 S. Ct. at 1118 (Sotomayor, J., dissenting) (citing *Kwan*, 407 F.3d at 1015; *Couto*, 311 F.3d at 188).

Kwan and *Couto*, federal circuit courts held that defense counsel's misstatements about immigration issues could constitute ineffective assistance of counsel under *Strickland*.[123] However, where the *Chaidez* majority saw *Kwan* and *Couto* as part of an established chain of precedent regarding attorney misstatements to a client,[124] the dissent instead saw a clear precedent of applying *Strickland* to advisement about the immigration consequences of a criminal conviction.[125]

Justice Sotomayor argued that the outcome of the *Strickland* test in *Padilla* was dictated by the combination of precedent for applying *Strickland* to deportation issues and the change in prevailing professional norms that requiring defense counsel to advise a client about deportation after the 1996 changes in immigration law. With the outcome dictated by the 1996 changes in immigration law and the change in prevailing professional norms in response to that legislation, *Padilla* did not announce a new rule under *Teague* and therefore should have been retroactive.[126]

III. ANALYSIS

In arguing that a "chink-free" wall between the direct and collateral consequences of a criminal conviction existed prior to *Padilla*, Justice Kagan ignored three lines of precedent that rendered the wall either nonexistent or thoroughly breached. The failure to acknowledge these precedents led to the erroneous decision that *Padilla* does not apply retroactively. First, the language of *Padilla* both denies the existence of Justice Kagan's wall and indicates that the Court anticipated the *Padilla* decision would be retroactive.[127] Second, the *Hill* Court had applied the *Strickland* test to the issue of advisement about parole eligibility, a collateral consequence of criminal conviction, clearly breaching Justice Kagan's wall.[128] Finally, *St. Cyr*, *Kwan*, and *Couto* each recognized a criminal defendant's right to information about the immigration consequences of a guilty plea after 1996.[129] Individually, each line of precedent provides a significant challenge to Justice Kagan's reasoning; taken together, the challenge is insurmountable.

Without the incorrect distinction between direct and collateral consequences, the 1996 changes in immigration law clearly dictated the result of the *Strickland* analysis in *Padilla*. With the *Padilla* outcome dictated, the *Teague* analysis in *Chaidez* should have resulted in the *Padilla* ruling applying retroactively.

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123. *Id.* (citing *Kwan*, 407 F.3d at 1015; *Couto*, 311 F.3d at 188).
124. *See id.* at 1111 n.12, 1112 (majority opinion).
125. *See id.* at 1118 (Sotomayor, J., dissenting).
126. *See id.* at 1120–21.
127. Padilla v. Kentucky, 559 U.S. 356, 365, 371–72 (2010).
128. Hill v. Lockhart, 474 U.S. 52, 58–60 (1985).
129. INS v. St. Cyr, 533 U.S. 289, 321–24 (2001); United States v. Kwan, 407 F.3d 1005, 1015 (9th Cir. 2005), *abrogated by Padilla*, 559 U.S. 356; United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002), *abrogated by Padilla*, 559 U.S. 356.

A. Padilla *Said What?*

The language of *Padilla* refutes two key elements of Justice Kagan's reasoning. First, the *Padilla* Court flatly rejected the distinction between collateral and direct consequences when it comes to Sixth Amendment analysis.[130] Second, the *Padilla* Court specifically acknowledged the possibility of opening the door to future claims as a result of granting Padilla's request.[131]

1. Justice Stevens: What Wall?

When Justice Kagan argued that *Padilla* "breach[ed] the previously chink-free wall between direct and collateral consequences," she quoted the *Padilla* decision: "*Strickland* applies to Padilla's claim."[132] It is an ironic choice of quotation because just two paragraphs earlier in the *Padilla* decision, Justice Stevens addressed the direct versus collateral distinction head-on: "We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[133] Justice Stevens discussed how, aside from the general issue of collateral versus direct consequences of conviction, deportation has a unique relationship to criminal conviction for the defendant.[134] Justice Stevens also noted the century-long history of connecting immigration status to criminal conviction.[135] According to the *Padilla* Court, the wall that is the basic underpinning of the *Chaidez* decision did not exist.

2. Floodgates?

The plain language of *Padilla* anticipated retroactivity.[136] Although it is dicta, Justice Stevens addressed the Government's concern that *Padilla* would open the floodgates to new claims.[137] Rather than arguing a flood could not occur because *Padilla* would not be retroactive, the Court pointed to the same concerns regarding the *Hill* decision.[138] Justice Stevens assured the Government that, in spite of *Hill* being applied retroactively, "[a] flood did not follow" because the prejudice prong of the *Strickland* standard was such a high bar to overcome.[139] This discussion

130. *Padilla*, 559 U.S. at 365.
131. *Id.* at 372–74.
132. Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013) (quoting *Padilla*, 559 U.S. at 366) (internal quotation marks omitted).
133. *Padilla*, 559 U.S. at 365 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).
134. *Id.* at 365–66.
135. *Id.*
136. *See id.* at 371–72 (discussing the possibility of a flood of cases based on the ruling).
137. *Id.*
138. *Id.*
139. *Id.* at 371.

demonstrates that the *Padilla* Court anticipated its holding would be retroactive.[140]

B. Hill v. Lockhart*: Breaching the Direct Versus Collateral Distinction*

Even if Justice Kagan's contention that there was a distinction between direct and collateral consequence is accepted, *Hill v. Lockhart* breached it in 1985.[141] The central underpinning of Justice Kagan's argument in *Chaidez* is that the application of the *Strickland* standard to *any* collateral consequence of conviction was a departure from precedent.[142] Justice Kagan noted that the *Hill* Court explicitly left open whether *Strickland* applied to collateral consequences.[143] The plain language of *Hill* supports this proposition, and *Hill* declined to rule on the issue of collateral consequences generally.[144] What Justice Kagan ignored is that the *Hill* Court did perform a *Strickland* analysis on the issue of advisement about parole eligibility.[145] Specifically, the *Hill* Court found that the petitioner failed to meet the second prong of the *Strickland* test.[146] If Kagan's wall existed, the *Hill* Court could have simply dismissed the claim on the collateral distinction basis—it did not.[147]

Justice Kagan pointed to Part II of *Padilla*, where the Court analyzed whether to apply *Strickland*, as an indication of breaking new ground regarding collateral consequences.[148] However, this ignored that the *Hill* Court, without analyzing whether to apply *Strickland*, did apply *Strickland* to the collateral consequence of parole eligibility.[149] Justice Kagan's central point, that *Padilla* was the first case to apply *Strickland* to a collateral consequence of a conviction, is simply erroneous. The *Hill* Court breached the distinction over a quarter of a century earlier.

C. St. Cyr, Kwan, *and* Couto *Recognize a Defendant's Right to Be Informed About the Immigration Consequences of a Guilty Plea After 1996*

The words of Justice William Brennan perfectly describe the error Justice Kagan made in *Chaidez*: "[T]he Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed

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140. Spahn, *supra* note 29, at 796–97.

141. *See* Hill v. Lockhart, 474 U.S. 52, 56–60 (1985) (applying the *Strickland* test to counsel's advice about parole eligibility, a collateral consequence).

142. Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013).

143. *Id.* at 1108.

144. *Hill*, 474 U.S. at 60 ("We find it unnecessary to determine whether . . . erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel.").

145. *Id.* at 58–59.

146. *Id.* at 60.

147. *See Hill*, 474 U.S. 52.

148. *Chaidez*, 133 S. Ct. at 1110.

149. Padilla v. Kentucky, 559 U.S. 356, 371 (2010) ("We confronted a similar 'floodgates' concern in *Hill*, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty." (citation omitted)).

the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing."[150]

The *Padilla* decision did not create a right to information about the immigration consequences of a guilty plea; rather, it recognized that right as a manifestation of the Sixth Amendment after the 1996 immigration laws went into effect. Three cases illustrate the recognition of that right prior to Padilla's conviction. In *St. Cyr*, the Court acknowledged that the 1996 changes in immigration law altered the professional norms for criminal defense counsel.[151] *Kwan* and *Couto* each acknowledged this right in relation to the Sixth Amendment.[152] Justice Kagan incorrectly viewed these three cases as assigning an obligation on defense counsel, rather than recognizing a right of criminal defendants.

1. The Court Recognizes the Impact of IIRIRA and AEDPA in *St. Cyr*

St. Cyr is not a Sixth Amendment case; instead, it is a case about the retroactivity of IIRIRA and AEDPA.[153] However, referring to IIRIRA and AEDPA, Justice Stevens wrote in his majority opinion, "[C]ompetent defense counsel, following the advice of numerous practice guides, would have advised [a client] concerning the provision's importance."[154] While this quote is dicta, one can infer the Supreme Court's recognition that after the 1996 immigration law changes, the Sixth Amendment's guarantee of effective assistance of counsel includes advisement about immigration consequences of criminal proceedings.

Even though *St. Cyr* is not a Sixth Amendment case, it is a clear statement from the Court that effective assistance of counsel includes advisement about the immigration ramifications of criminal proceedings after the 1996 immigration laws became effective. Regardless of whether this is an acknowledgment of a breach in Justice Kagan's wall or a statement of the wall's nonexistence, it refutes the idea of a pristine distinction.

2. *Kwan* and *Couto* apply *St. Cyr* to the Sixth Amendment

While *St. Cyr* did not deal directly with the Sixth Amendment implications of the 1996 immigration law changes, *Kwan* and *Couto* did.[155] Each decision noted that IIRIRA and AEDPA made deportation nearly automatic following certain convictions.[156] Because the consequence of

150. United States v. Verdugo-Urquidez, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting).

151. INS v. St. Cyr, 533 U.S. 289, 321, 323 n.50 (2001).

152. United States v. Kwan, 407 F.3d 1005, 1016 (9th Cir. 2005), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010); United States v. Couto, 311 F.3d 179, 187–88 (2d Cir. 2002), *abrogated by* Padilla v. Kentucky, 559 U.S. 356 (2010).

153. *St. Cyr*, 533 U.S. at 292–93.

154. *Id.* at 323 n.50.

155. *Kwan*, 407 F.3d at 1016; *Couto*, 311 F.3d at 187–88.

156. *Kwan*, 407 F.3d at 1008–09; *Couto*, 311 F.3d at 189–90.

deportation had become a nearly automatic result of certain criminal convictions for noncitizen defendants, each decision held that *Strickland* applies to defense counsel's misstatements about deportation.[157] Both decisions cited *St. Cyr* as acknowledgment by the Supreme Court of a defendant's right to advisement about the immigration consequences of a criminal conviction.[158]

When viewed in the light of *Kwan* and *Couto*, the announcement in *Padilla* essentially expanded the existing prohibition against misstatements to include omissions: no misstatements (*Kwan* and *Couto*) or omissions (*Chaidez*) about deportation.[159] Justice Kagan argued that this distinction has meaning; she placed *Kwan* and *Couto* in a line of cases that prohibit attorney misstatements in general and gave no weight to the cases' importance in recognizing the right of a criminal defendant to information about the immigration consequences of a guilty plea.[160]

Adding a prohibition against attorney omissions to an existing rule prohibiting attorney misstatements about deportation, however, is only significant if viewed from the attorney's side of the attorney-client equation. While there is admittedly a difference between requiring an attorney to provide accurate information and prohibiting an attorney from providing inaccurate information, there is no difference from the point of view of a criminal defendant: either way, the defendant lacks the necessary information to make an informed decision. By viewing these obligations from the vantage point of the attorney, Justice Kagan misinterpreted the Sixth Amendment. The Sixth Amendment does not confer obligations upon attorneys; it recognizes the rights of criminal defendants.[161]

St. Cyr did not create an obligation that attorneys provide accurate information about the immigration consequences of a guilty plea after the 1996 changes in the law; rather, it recognized that after the 1996 changes in the law defendants have a right to accurate information about the immigration consequences of a guilty plea. This right is what ultimately determines what information defense counsel has a duty to provide, not the reverse. Jose Padilla had the right to advisement by counsel about the immigration consequences of his guilty plea in 2002. The Supreme Court recognized it and provided him the relief to which he was entitled.

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157. *Kwan*, 407 F.3d at 1015–16; *Couto*, 311 F.3d at 188.

158. *Kwan*, 407 F.3d at 1016; *Couto*, 311 F.3d at 187–88.

159. Chaidez v. United States, 133 S. Ct. 1103, 1118–19 (2013) (Sotomayor, J., dissenting).

160. *Id.* at 1112 (majority opinion).

161. *See* U.S. CONST. amend. VI.

> In all criminal prosecutions, *the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*

Id. (emphases added).

Roselva Chaidez had the exact same right in 2003, but the Supreme Court failed to recognize it and denied her the relief to which she was entitled.

D. Strickland *Dictated the Outcome in* Padilla

Writing for the majority in *Padilla*, Justice Stevens specifically pointed to IIRIRA and AEDPA as critical factors in the decision: "[I]mportantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."[162] The Court stated that because of the near automatic nature of the consequence it was "'most difficult' to divorce the penalty from the conviction in the deportation context."[163]

With the wall between direct and collateral consequence either never having existed, or if it had, having been breached by the time of *Padilla*, the Court applied the first prong of the *Strickland* test: whether the assistance of counsel was effective.[164] Using the professional norms of the time as the measuring stick, *Strickland* dictated that the *Padilla* Court find counsel ineffective for failing to warn Padilla about the impact of a guilty plea on his immigration status.[165] Professional norms are the measuring stick of *Strickland*; when the norms changed in response to the 1996 immigration law changes, that change dictated the outcome of the *Strickland* test in *Padilla*.

E. The Supreme Court Should Have Found Padilla *Retroactive Under* Teague *in* Chaidez

If a wall ever existed between direct and collateral consequences,[166] it was far from chink-free by the time *Padilla* was decided. Justice Kagan emphasized the fact that the *Padilla* Court went through a separate analysis to determine whether to apply *Strickland*.[167] The point she ignored was that the *Padilla* Court decided *Strickland* did apply—and further noted that the prevailing professional norms dictated the outcome.[168] Applying the Sixth Amendment to collateral consequences was not breaking new ground.

Without the distinction of direct versus collateral consequences to cloud the issue, nothing else about the *Padilla* case was anything other than a garden-variety application of *Strickland*.[169] *Padilla* merely applied

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162. Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

163. *Id.* (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982), *abrogated by Padilla*, 559 U.S. 356).

164. *Id.*

165. *See id.* at 366–67.

166. *See id.* at 365 ("We, however, have never applied a distinction between direct and collateral consequences . . . .").

167. Chaidez v. United States, 133 S. Ct. 1103, 1110 (2013).

168. *See id.* at 1114–15 (Sotomayor, J., dissenting).

169. *Id.* at 1114.

the standard for effective counsel from *Strickland* to a new set of circumstances: the deportation consequences of a guilty plea—after the enactment of the 1996 immigration laws.[170] Under *Teague*, a rule that is the result of applying established precedent to new circumstances is retroactive;[171] the *Chaidez* dissent correctly concluded that this was the case with the *Padilla* decision.

CONCLUSION

The *Chaidez* decision was an injustice. Had circumstances alerted Roselva Chaidez to her deportation status earlier than it did, perhaps she would have beaten Jose Padilla to the Supreme Court and received the relief to which she was entitled. The *Chaidez* Court ignored the *Hill*, *St. Cyr*, *Kwan*, and *Couto* decisions—and the language of the *Padilla* decision itself—when it determined that *Padilla* announced a new rule. *Hill*, *St. Cyr*, *Kwan*, and *Couto* had already established a defendant's right to information about the immigration consequences of a criminal conviction. Precedent for applying *Strickland* to collateral consequences of a criminal conviction, specifically immigration consequences, already existed.[172]

If the chink-free wall between direct and collateral consequences ever existed, it had gaping holes punched through it by the time of the *Padilla* decision. The prevailing professional norms required criminal defense counsel to advise a client about the deportation consequences of a guilty plea. These two facts, when measured against *Strickland*, dictated the outcome in *Padilla*. Under *Teague*, a dictated outcome does not establish a new rule. Because *Padilla* did not announce a new rule, its holding should have applied retroactively to Roselva Chaidez.

Levi Price[*]

170. *Id.* at 1115.

171. *Id.* at 1107 (majority opinion).

172. *Id.* at 1118 (Sotomayor, J., dissenting).

* J.D. Candidate, 2015. I would like to thank Professor Rashmi Goel for her guidance and motivation during the preparation of this Comment for publication. I would also like to thank the members of the *Denver University Law Review* Board for their insight and assistance. Most of all, I want to thank the love of my life, my wife Ginger, for putting up with way too many hours of "Grumpy Lev" during the writing of this Comment.

FLORIDA V. JARDINES: TRESPASSING ON THE REASONABLE EXPECTATION OF PRIVACY

ABSTRACT

The Fourth Amendment affords an individual's home robust protections from unreasonable searches. After all, the home is a highly private locus and deserves heightened protections because it is where our most personal and intimate activities occur. By finding in favor of the individual in *Florida v. Jardines*, the United States Supreme Court did not question this critical principle; a majority of the Justices concluded that absent a warrant, the police cannot bring a drug-sniffing dog into a home's curtilage to search for narcotics. The *Jardines* Court premised its decision on property and trespass law, determining that there had been a per se violation of the Fourth Amendment because the police gathered evidence by physically intruding onto Mr. Jardines' front porch.

However, the majority's sole reliance on property law rendered its ruling incomplete. As Justice Kagan aptly noted in her concurring opinion, it would have been equally as appropriate to use privacy doctrine to resolve the case. The majority's purposeful disregard of that critical analysis leaves important questions unanswered and threatens to diminish Fourth Amendment protections.

This Comment argues that the Court in *Florida v. Jardines* should have included an analysis of privacy doctrine and then discusses some of the implications that arise from its absence. Although the individual prevailed in *Jardines*, the majority's narrow focus on property and trespass law ignored an opportunity to overrule questionable cases and failed to create broadly applicable precedent. Furthermore, the decision threatens to diminish the Fourth Amendment protections of individuals who do not live in single-family detached homes with accompanying property rights. Lastly, the majority's neglect of a privacy analysis may send the message that it is unworthy of consideration, and may therefore limit the future application of critical privacy doctrine.

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INTRODUCTION

The Fourth Amendment provides, in part, that citizens have a right to be free from unreasonable searches.[1] A Fourth Amendment search occurs when the government infringes on an individual's reasonable expectation of privacy[2] or "[w]hen 'the [g]overnment obtains information by physically intruding' on persons, houses, papers, or effects."[3] As a check against abusive government power, a search generally "requires a warrant that is based on probable cause."[4] If, however, the subject of the search does not have a reasonable expectation of privacy and the government does not commit an intrusion, then no warrant is required and for the "purposes of the Fourth Amendment . . . no search occurs."[5] Such a system naturally creates tension between governmental police power and individual rights.[6] In attempting to balance these often competing interests, the Supreme Court must walk a fine line that preserves both.[7]

Florida v. Jardines,[8] a 2013 Supreme Court decision, addressed whether police use of a drug-sniffing dog on the front porch of a house was a search subject to Fourth Amendment protections.[9] The majority

1. U.S. CONST. amend. IV.
2. Michael Mayer, *Keep Your Nose out of My Business—A Look at Dog Sniffs in Public Places Versus the Home*, 66 U. MIAMI L. REV. 1031, 1033 (2012).
3. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (quoting United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012)).
4. Brian L. Porto, Annotation, *Use of Trained Dog to Detect Narcotics or Drugs as Unreasonable Search in Violation of Fourth Amendment*, 150 A.L.R. FED. 399 (2005).
5. *See* California v. Greenwood, 486 U.S. 35, 39–42 (1988); Mayer, *supra* note 2, at 1033.
6. *See* Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 584 (1989).
7. *Id.*
8. 133 S. Ct. 1409 (2013).
9. *Id.*

concluded that a warrantless sniff search targeting the interior of the home but conducted from the front porch violated the Fourth Amendment.[10] However, the majority utilized property and trespass law instead of privacy-rights doctrine to reach its decision.[11] This property-based approach for deciding a dog-sniff case departed from most modern precedent[12] that had relied on privacy doctrine.[13] By purposefully neglecting to address an individual's reasonable expectation of privacy, the majority in *Jardines* failed to clarify or address the critical privacy concerns present when dog sniff searches are aimed at residences. Consequently, the *Jardines* decision threatens to diminish Fourth Amendment protections for those citizens who do not live in single-family detached houses.

This Comment progresses in three parts. Part I addresses prior dog-sniff and recent Fourth Amendment cases and provides context for the *Jardines* decision. Part II summarizes *Jardines*' facts, procedural history, majority, concurring, and dissenting opinions. Part III explores and critiques the majority's rationale. It examines whether *Jardines* effectively overrules prior dog-sniff and Fourth Amendment search cases, and discusses *Jardines*' potential implications for Fourth Amendment privacy rights. Finally, this Comment posits that although the Court's opinion resulted in a victory for Mr. Jardines, the majority's sole reliance on property rights rendered the analysis incomplete and thus threatens to reduce the Fourth Amendment protections *Jardines* purportedly safeguards.

I. BACKGROUND

A. Modern Fourth Amendment Jurisprudence

The Supreme Court's 1967 decision in *Katz v. United States*[14] transformed Fourth Amendment doctrine and ushered it into the modern era.[15] *Katz* departed from a narrow and literal text-based interpretation of *search*, defined the term more broadly,[16] and suggested that future analysis proceed "on a case by case basis."[17] Deciding it was no longer limited to a dictionary definition[18] and an old property and trespass analysis,[19]

10. *Id.*

11. *Id.* at 1417.

12. *Contra* United States v. Jones, 132 S. Ct. 945, 951–52 (2012) (providing a recent example of the Court relying on a property analysis to answer a Fourth Amendment search question).

13. *Compare Jardines*, 133 S. Ct. at 1417 (basing the majority opinion on only a property law analysis), *with* Illinois v. Caballes, 543 U.S. 405, 409–10 (2005) (using a privacy doctrine analysis to determine that a sniff search of the outside of a lawfully stopped car did not violate the Fourth Amendment), *and* United States v. Place, 462 U.S. 696, 707 (1983) (relying on privacy doctrine to conclude that a dog sniff of luggage did not violate the Fourth Amendment).

14. 389 U.S. 347 (1967).

15. *See* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 704–05 (2011).

16. Serr, *supra* note 6, at 588–89, 593.

17. Mayer, *supra* note 2, at 1033.

18. Serr, *supra* note 6, at 591.

the *Katz* Court liberally construed *search* to mean any action taken by the government that breached a citizen's reasonable expectation of privacy.[20] Justice Stewart, writing for *Katz*'s majority, explained, "[T]he Fourth Amendment protects people, not places," including "what[ever an individual] seeks to preserve as private, even in an area accessible to the public."[21] Using this analysis, the Court determined that the government's warrantless monitoring of Mr. Katz's conversation in an enclosed telephone booth violated the Fourth Amendment because Mr. Katz sought to keep his conversation private.[22] However, the majority also noted that the Fourth Amendment does not protect activity voluntarily exposed to the public, even if such activity occurs within a home or private area.[23] Justice Harlan's concurring opinion helped clarify the Court's ruling.[24] Recognizing the predominantly subjective nature of the majority's new test (i.e., "whether an individual has knowingly exposed something to the public or sought to preserve it as private"),[25] Justice Harlan established a twofold requirement for determining if the government has violated an individual's Fourth Amendment rights.[26] "[F]irst[,] that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that . . . is . . . 'reasonable.'"[27] This reasonable expectation of privacy interpretation became the accepted and prevailing view, and has served as the foundational analysis in almost all modern Fourth Amendment search cases.[28] *Katz* and Justice Harlan's two-pronged approach remain, to this day, good law.[29]

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19. Marceau, *supra* note 15, at 704. Prior to *Katz*, "the governing principle of Fourth Amendment law . . . was predicated on . . . property rights." *Id.* at 702. The Court's infamous decision in *Olmstead v. United States* demonstrated how the Court exclusively protected physical property rights. Olmstead v. United States, 277 U.S. 438, 466 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967). The Court ruled in *Olmstead* that federal agents' warrantless wiretaps on Mr. Olmstead's home and office telephones did not violate the Fourth Amendment because the wiretaps were not invasions of physical material interests. *Id.* Rather, the Court concluded that phone conversations were intangible and therefore incapable of suffering physical invasions. *Id.* The Court has also historically held that there is a per se violation of the Fourth Amendment when the police trespass to search and obtain information. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 509–10 (1961). The Court in *Silverman* found a violation of the Fourth Amendment not because the police unreasonably invaded Silverman's privacy rights, but because their search "was accomplished by means of an unauthorized physical penetration into the premises occupied by [Silverman]." *Id.* at 509.

20. Mayer, *supra* note 2, at 1033.

21. Katz v. United States, 389 U.S. 347, 351 (1967).

22. *Katz*, 389 U.S. at 352 ("One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."); Serr, *supra* note 6, at 592.

23. *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); Serr, *supra* note 6, at 592.

24. *Katz*, 389 U.S. at 360–62 (Harlan, J., concurring); Serr, *supra* note 6, at 592.

25. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); Serr, *supra* note 6, at 592.

26. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

27. *Id.*

28. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 27 (2001) ("In assessing [searches], the Court has adapted a principle first enunciated in *Katz v. United States* . . . ."); California v. Greenwood, 486 U.S. 35, 39 (1988) (explaining that there would be a Fourth Amendment violation "only if respondents manifested a subjective expectation of privacy . . . that society accepts as objectively

Oliver v. United States,[30] a prominent Fourth Amendment case decided in 1984, used *Katz*'s exception for activity voluntarily exposed to the public's view to limit protection from searches.[31] The Court concluded that individuals do not have a reasonable expectation of privacy in privately owned but publicly accessible outdoor fields and open lands, even if the owner of those lands took reasonable precautions to limit the public's access.[32] Fences and no trespassing signs were, according to the majority, not enough to establish a reasonable expectation of privacy.[33] Open fields typically do not serve as a setting for private activities in the way that a home or office does. Nonetheless, by limiting the definition and application of what constituted a reasonable expectation of privacy, the Court weakened *Katz*'s subjective reasonableness standard.[34]

Soon after the *Oliver* decision, the Court rendered another significant opinion in *California v. Ciraolo*,[35] which again narrowed the definition of what constitutes a reasonable expectation of privacy.[36] The Court held that aerial surveillance of curtilage—the home's immediate surrounding land and fixtures—does not infringe on Fourth Amendment protections.[37] The majority employed *Oliver*'s rationale and reasoned that individuals who expose activities conducted within the curtilage to public view, even if only from above, forfeit any reasonable expectation of privacy.[38] Whereas *Oliver* dealt only with open fields far from the home,[39] *Ciraolo* seized upon the *Katz* exception for "knowingly expos[ed] to the public"[40] to conclude that a visual search aimed at curtilage, a traditionally protected area,[41] was permissible if that area was not

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reasonable"); California v. Ciraolo, 476 U.S. 207, 211 (1986) ("The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy . . .' [supported by *Katz*'s] two-part inquiry . . . ." (citation omitted) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))); Smith v. Maryland, 442 U.S. 735, 740 (1979) ("[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action. This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions." (citations omitted)).

29. Serr, *supra* note 6, at 593. *Katz* remains good law notwithstanding the fact that *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013), and *United States v. Jones*, 132 S. Ct. 945, 949 (2012), have resuscitated the old property and trespass approach for examining Fourth Amendment searches.

30. 466 U.S. 170 (1984).

31. *Id.* at 179.

32. *Id.* at 182.

33. *Id.*

34. *See* Serr, *supra* note 6, at 597–98.

35. 476 U.S. 207 (1986).

36. *Id.* at 213–14.

37. *Id.*

38. *Id.* at 215.

39. Oliver v. United States, 466 U.S. 170, 179 (1984).

40. Katz v. United States, 389 U.S. 347, 351 (1967).

41. Florida v. Jardines, 133 S. Ct. 1409, 1414–15 (2013). Because curtilage has "ancient and durable roots" and is protected as a "branch[] and appurtenant[]" part of the house, Justice Scalia concluded that "the officers' investigation took place in a constitutionally protected area." *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 225 (1769)) (internal quotation mark omitted).

hidden from public view.[42] Although the police conducted their search in *Ciraolo* "in a physically nonintrusive manner" (so that no trespass occurred),[43] the Court's upholding of their visual invasion of curtilage nonetheless resulted in a move away from *Katz*'s robust protections.[44] After all, it is most likely reasonable for average citizens to expect that the police will not fly over their houses at low altitude and peer down into their patios and backyards.[45]

Unlike *Oliver* and *Ciraolo*, two of the Supreme Court's more recent and illustrative Fourth Amendment cases have found in favor of the individual and sustained protection from unreasonably invasive police searches.[46] *Kyllo v. United States*[47] accomplished this by applying *Katz*'s reasonable expectation of privacy test,[48] whereas *United States v. Jones*[49] upheld Fourth Amendment protections by returning to a property analysis.[50] In *Kyllo*, Justice Scalia, writing for the majority, held that the use of "sense-enhancing technology"—in this instance thermal-imaging technology only available to the government—to gather otherwise private information from the home constituted a search because it violated the heightened privacy expectations associated with the home.[51] He wrote that even if used from a public area, intrusive technology capable of viewing the activity inside a home invaded privacy rights and required a warrant and probable cause.[52] Both *Kyllo* and *Ciraolo* occurred without a physical trespass,[53] but *Kyllo* violated the Fourth Amendment because the thermal-imager's visual invasion of activity within the home went beyond *Ciraolo*'s mere visual invasion of activity within the curtilage.[54]

In *Jones*, the Court determined that attaching a Global Positioning System (GPS) tracking device to an automobile without a warrant violated the Fourth Amendment because a search occurs "within the original meaning of the Fourth Amendment" when "the [g]overnment obtains information by physically intruding" on persons or their property.[55]

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42. *Ciraolo*, 476 U.S. at 215.
43. *Id.* at 213.
44. *See* Serr, *supra* note 6, at 611–13.
45. *See id.*
46. *See* United States v. Jones, 132 S. Ct. 945, 950 (2012); Kyllo v. United States, 533 U.S. 27, 40 (2001).
47. 533 U.S. 27 (2001).
48. *Id.* at 40.
49. 132 S. Ct. 945 (2012).
50. *Id.* at 950. Although *Jones* was a victory for the individual, Justice Scalia, writing for the majority, disconcertingly deviated from the well-established *Katz* standard. *Id.* This deviation from the traditional privacy analysis was repeated again the following year in Justice Scalia's majority opinion in *Florida v. Jardines*. *See infra* Parts II.C, III.B–C.
51. *Kyllo*, 533 U.S. at 34.
52. *Id.*
53. *See id.* at 31–33; California v. Ciraolo, 476 U.S. 207, 213 (1986).
54. *See Kyllo*, 533 U.S. at 37–38. Justice Scalia noted, seemingly with disapproval, that the thermal-imager might disclose the "intimate" detail of "at what hour each night the lady of the house takes her daily sauna and bath." *Id.* at 38 (internal quotation marks omitted).
55. *Jones*, 132 S. Ct. at 958 n.3, 964 (Sotomayor, J., concurring).

However, Justice Scalia, again writing for the majority, declined to address whether such police action violated the *Katz* reasonable expectation of privacy standard.[56] Instead, he decided the case solely based on trespass law.[57] Although he noted that searches "remain[ed] subject to *Katz* analysis,"[58] Justice Scalia declined to "rush[] forward to resolve [*Katz* issues] here" because he felt that a privacy analysis would needlessly raise "thorny problems" given *Jones*' particular set of facts.[59]

However, Justice Sotomayor authored a concurring opinion specifically noting that in addition to the correctly applied property doctrine, the Court should have at least considered the *Katz* standard.[60] She questioned whether the use of a GPS tracking device to monitor the movements of an individual violated a citizen's reasonable expectation of privacy, and impliedly answered that it most likely did.[61] Yet, notwithstanding Justice Sotomayor's desire to include a privacy-rights analysis, *Jones* helped lay the foundation for the Court's return to a trespass analysis,[62] and served as important precedent for Justice Scalia's opinion in *Jardines*.[63]

B. The Supreme Court's Dog-Sniff Cases

Prior to *Jardines*, the United States Supreme Court had never addressed the constitutionality of a drug-dog's warrantless sniff search performed within the curtilage of an individual's home. However, in *United States v. Place*[64] and *Illinois v. Caballes*[65] the Court did address the Fourth Amendment implications of when police dogs aimed their sniffs at objects other than a home. In both cases, the Court found that dogs sniffing for narcotics did not violate the Fourth Amendment.[66] *Place* held that use of a dog to sniff luggage at an airport was not a search because a sniff was less intrusive than a physical search of the luggage's contents and because the contents remained private.[67] Although the sniff disclosed the presence of narcotics, such disclosure was limited and "did not constitute a 'search' within the meaning of the Fourth Amendment."[68] Similarly, *Caballes* concluded that a dog sniff performed in the course of a traffic stop did not implicate privacy concerns.[69] The majority held that a dog sniff of the exterior of a car legally stopped on a public road did not

56. *Id.* at 950 (majority opinion).
57. *Id.*
58. *Id.* at 953 (emphasis omitted).
59. *Id.* at 954.
60. *Id.* at 955 (Sotomayor, J., concurring).
61. *See id.* at 956.
62. *See id.* at 949–50 (majority opinion).
63. *See* Florida v. Jardines, 133 S. Ct. 1409, 1414, 1417 (2013).
64. 462 U.S. 696 (1983).
65. 543 U.S. 405 (2005).
66. *Id.* at 409–10; *Place*, 462 U.S. at 707.
67. *Place*, 462 U.S. at 707.
68. *Id.*
69. *Caballes*, 543 U.S. at 408–09.

breach an individual's reasonable expectation of privacy.[70] The Court in *Place* explained that reasonable expectations of privacy may be tied to "the manner in which the information is obtained."[71] Because in both cases the search occurred in a public area and did not constitute a physical intrusion (i.e., a trespass), the Court concluded that each search was reasonable and "[did] not rise to the level of a constitutionally cognizable infringement."[72]

C. Lower Courts' Treatment of Dog Sniffs Targeting Dwellings

Several of the nation's lower courts have considered whether the Fourth Amendment protects against dog sniffs aimed at dwellings when the sniffs are conducted from the hallways and common spaces of hotels, apartments, and other multi-unit residences.[73] Although the United States Supreme Court has upheld certain Fourth Amendment protections for those who do not own their residences,[74] the lower courts' near unanimous conclusions have been that neither property law nor privacy rights protect residents living in multi-unit dwellings from dog sniff searches targeting their home but conducted from hallways or common areas.[75]

The United States Court of Appeals for the Eighth Circuit, perhaps unsurprisingly, did not afford an individual staying in a hotel room the same heightened privacy protections granted to someone residing in a single-family detached house.[76] Although people renting hotel rooms are entitled to privacy within the room,[77] the Eighth Circuit concluded that an expectation of privacy does not extend to the common hallway outside the room because it is open to the public and "traversed by many people."[78] As a result, a drug-sniffing dog patrolling the hallway and

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70. *Id.*

71. *Place*, 462 U.S. at 707.

72. *Caballes*, 543 U.S. at 409.

73. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1015–16 (8th Cir. 2010) (holding that a canine's drug-sniff from the publicly accessible hallway of an apartment building was not an unreasonable violation of privacy expectations); United States v. Roby, 122 F.3d 1120, 1124 (8th Cir. 1997) (holding that a drug-dog sniffing into rooms from a hotel corridor did not violate Fourth Amendment privacy rights); Fitzgerald v. State, 864 A.2d 1006, 1017–18 (Md. 2004) (holding that a drug-dog's sniff of the exterior of an apartment was not a search because the police and dog were lawfully located in the apartment building's common areas).

74. *See, e.g.*, Miller v. United States, 357 U.S. 301, 313 (1958) (holding that warrantless entry into an apartment is a Fourth Amendment violation); McDonald v. United States, 335 U.S. 451, 453, 456 (1948) (holding that a tenant in a rooming house had his Fourth Amendment rights violated when the police entered his room without a warrant).

75. *See supra* note 73; *contra* United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985) (holding that a drug-dog sniffing from the hallway into an apartment violated the Fourth Amendment because it infringed on the dweller's heightened expectation of privacy attached to his place of residence).

76. *See Roby*, 122 F.3d at 1124.

77. *Id.* at 1125 (concluding that "Mr. Roby had an expectation of privacy in his . . . hotel room").

78. *Id.*

detecting odors emanating from the rooms "does not contravene the Fourth Amendment" even though the dog is sniffing into private areas.[79]

Additionally, state and federal courts, with rare exception, do not afford apartment dwellers the same level of Fourth Amendment protection against dog sniffs[80] as the Supreme Court now affords residents of single-family houses.[81] Residents of apartment buildings do not have property rights in the hallways—the closest thing to curtilage in a multi-unit dwelling. Thus, unlike individuals living in detached single-family houses, apartment dwellers cannot grant or revoke licenses[82] to people or police dogs approaching their front doors.[83] Courts have also determined that, similar to hotel corridors, the quasi-public nature of hallways and common areas in apartment buildings diminishes or even eliminates a resident's reasonable expectation of privacy in those locations.[84] The rationale is that public access to hallways and common areas, even if only to a limited extent, necessarily reduces the resident's privacy expectation because anyone could be passing through.[85] The court in *Fitzgerald v. State*[86] clearly articulated that because "the apartment building's common area and hallways were accessible to the public," the dog sniff was not a search because the police were not trespassing or violating privacy rights.[87] *United States v. Scott*[88] similarly held that a sniff search of an apartment's front door was legal because the police and drug-sniffing dog were lawfully present in the hallway outside of the apartment and engaged in the course of "[o]fficial conduct that [did] not 'compromise any legitimate interest in privacy.'"[89]

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79. *Id.*

80. *See supra* note 73 and accompanying text; Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 831 (2009) (noting that the Second Circuit is the only federal circuit court to conclude that a dog sniff of a private residence is a search).

81. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

82. Historically, residents of detached single-family houses have had the power to grant or revoke licenses to others approaching their home, thereby controlling who can access their property. *See id.* at 1415. "A license may be implied from the habits of the country," McKee v. Gratz, 260 U.S. 127, 136 (1922) (citing Marsh v. Colby, 39 Mich. 626, 627 (1878)), but there also exists an "implicit license typically permit[ting] the visitor to approach the home." *Jardines*, 133 S. Ct. at 1415.

83. *See* United States v. Cephas, 254 F.3d 488, 494 (4th Cir. 2001); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991).

84. *See, e.g.*, United States v. Brown, 169 F.3d 89, 92 (1st Cir. 1999) (citing United States v. Hawkins, 139 F.3d 29, 32 (1st Cir. 1998)) ("It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building."); Mayer, *supra* note 2, at 1043.

85. *See* Mayer, *supra* note 2, at 1043–44.

86. 864 A.2d 1006 (Md. 2004).

87. *Id.* at 1017–18.

88. 610 F.3d 1009 (8th Cir. 2010).

89. *Id.* at 1016 (quoting Illinois v. Caballes, 543 U.S. 405, 408 (2005)) (internal quotation marks omitted).

The only potential caveat in such cases, explained by the Sixth Circuit in *United States v. Heath*,[90] is that a heightened expectation of privacy may exist when apartment buildings are locked and only accessible to tenants.[91] Nonetheless, the expectation of privacy may be diminished if even just one resident of the building unlocks the doors and permits the police to enter.[92] If that occurs, the police presence becomes lawful, and they may search hallways and common areas and use dogs to sniff for drugs.[93]

II. *FLORIDA V. JARDINES*

A. Facts

On November 3, 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that Joelis Jardines was cultivating marijuana in his home.[94] One month later, Detective Pedraja and Detective Bartelt investigated the claim.[95] Franky, a drug-sniffing dog, accompanied Detectives Bartelt and Pedraja as they staked out Mr. Jardines' home.[96] After observing the home for fifteen minutes and not seeing any signs of activity, Detectives Pedraja and Bartelt, along with Franky, approached Mr. Jardines' house.[97] As Franky neared the residence he became excited, having detected one of the odors he was trained to recognize.[98] Seeing Franky agitated, Detective Pedraja "stood back," and Detective Bartelt gave Franky the full benefit of the six-foot leash so that the dog could freely ascertain the source of the odor.[99] Franky worked his way up onto Mr. Jardines' porch, ultimately settling at the base of the home's front door and signaling that this was the odor's origin and strongest point.[100] Detective Bartelt and Franky then retreated, and Bartelt notified Pedraja that Franky had positively indicated that narcotics were present.[101]

Based on Franky's discovery, Detective Pedraja quickly moved for and obtained a warrant to search Mr. Jardines' residence where, upon execution, the police discovered marijuana plants growing inside.[102] The

90. 259 F.3d 522 (6th Cir. 2001).
91. *Id.* at 534.
92. *See* United States v. Broadway, 580 F. Supp. 2d 1179, 1193 (D. Colo. 2008).
93. *See id.*
94. Jardines v. State, 73 So. 3d 34, 37 (Fla. 2011), *rev'g* 9 So. 3d 1 (Fla. Dist. Ct. App. 2008), *aff'd*, 133 S. Ct. 1409 (2013).
95. *Id.*
96. *Id.*
97. Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

police arrested Mr. Jardines and charged him with marijuana trafficking.[103]

B. Procedural History

Mr. Jardines argued at his trial that the use of a drug-sniffing dog positioned on his front porch was an unreasonable search under the Fourth Amendment.[104] The trial court held an evidentiary hearing on the matter,[105] ruled in favor of Mr. Jardines, and granted his motion to suppress the discovery of the marijuana plants.[106] The State appealed, and the Florida Third District Court of Appeal reversed the suppression ruling.[107] The court concluded that no illegal search occurred because a dog sniff did not require a warrant, the police had probable cause, and the discovery of the marijuana "was inevitable."[108] The Florida Supreme Court accepted a petition for discretionary review and overruled the Third District Court of Appeal's decision.[109] The Florida Supreme Court held that the use of Franky to investigate Mr. Jardines' house was a Fourth Amendment search unsupported by probable cause,[110] reasoning that the tip that Mr. Jardines was growing marijuana was unverified, uncorroborated, and from an unknown individual.[111] It therefore concluded that the warrant obtained in light of Franky's sniff search was invalid.[112] Furthermore, Florida's Supreme Court determined that the "'sniff test' . . . constitute[d] an intrusive procedure" and was a "'search' within the meaning of the Fourth Amendment."[113] The United States Supreme Court granted certiorari, taking up the question of whether the officers' and dog's behavior was a Fourth Amendment search.[114]

C. Majority Opinion

In a 5–4 opinion authored by Justice Scalia, the Court affirmed the Florida Supreme Court, concluding that police use of a narcotics sniffing dog "to investigate the home and its immediate surroundings" constituted a Fourth Amendment search.[115] In his opinion, joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, Justice Scalia focused his analysis

103. *Id.*
104. *Id.*
105. Jardines v. State, 73 So. 3d 34, 38 (Fla. 2011), *rev'g* 9 So. 3d 1 (Fla. Dist. Ct. App. 2008), *aff'd*, 133 S. Ct. 1409 (2013).
106. *Jardines*, 133 S. Ct. at 1413.
107. *Id.*
108. *Jardines*, 73 So. 3d at 38 (quoting State v. Jardines, 9 So. 3d 1, 10 (Fla. Dist. Ct. App. 2008)).
109. *Jardines*, 133 S. Ct. at 1413.
110. *Id.*
111. *Jardines*, 73 So. 3d at 54–55.
112. *Id.* at 55.
113. *Id.* at 49.
114. *Jardines*, 133 S. Ct. at 1414.
115. *Id.* at 1417–18.

on property rights, not privacy rights.[116] He found that a trespass occurred because the police "physically intrud[ed] on Jardines' property to gather evidence" without Mr. Jardines' consent.[117] Quoting *United States v. Jones*, Justice Scalia concluded that because any information gathered by warrantless physical intrusion was a per se violation of the Fourth Amendment, Mr. Jardines had undoubtedly been the victim of an illegal search.[118]

The majority found that an individual's right "to retreat into his own home and . . . be free from unreasonable governmental intrusion" stood at the "very core" of the Fourth Amendment's guarantee[119] that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[120] The Court recognized that the Fourth Amendment does not apply to all intrusions onto personal property,[121] but concluded that it does protect against physical invasions of "[t]he area 'immediately surrounding and associated with the home'" (i.e., the curtilage).[122]

Because curtilage includes the front porch, the Court considered whether the police committed "an unlicensed physical intrusion."[123] The majority decided that the police did commit such an intrusion because they entered Mr. Jardines' porch without his consent and engaged in something for which "[t]here [was] no customary invitation."[124] According to Justice Scalia, the implicit license that homeowners grant to visitors such as "Girl Scouts [or] trick-or-treaters" does not extend to trained narcotics dogs fishing for evidence.[125] He said that no customary license grants the police an invitation "to explore the area around the home in hopes of discovering incriminating evidence."[126] Therefore, the police and drug-dog exceeded the scope of their license[127] and unlawfully intruded onto Mr. Jardines' property.[128] The Court concluded that an illegal search occurred because the government obtained information by intruding into a constitutionally protected area without permission.[129] Acquir-

116. *Id.* at 1414, 1417.
117. *Id.* at 1417.
118. *Id.* at 1414 (quoting United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012)).
119. *Id.* at 1412 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).
120. *Id.* at 1414 (quoting U.S. CONST. amend. IV) (internal quotation marks omitted).
121. *Id.* (citing Hester v. United States, 265 U.S. 57, 59 (1924)).
122. *Id.* at 1412, 1414 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).
123. *Id.* at 1415.
124. *Id.* at 1415–16.
125. *Id.*
126. *Id.* at 1416.
127. *Id.* at 1415–16. Justice Scalia noted that the police are within the scope of their license if they merely approach the home, but that action above and beyond what "any private citizen might do" (such as bringing a dog onto your porch to sniff for drugs) exceeds the scope of their implied license because such action breaches "background social norms." *Id.* (quoting Kentucky v. King, 131 S. Ct. 1849, 1862 (2011)) (internal quotation mark omitted).
128. *Id.* at 1416.
129. *Id.* at 1414.

ing information by such means automatically triggers property and trespass-based Fourth Amendment protections.[130] Consequently, Justice Scalia concluded that there was no need to examine whether the police violated Mr. Jardines' privacy rights under *Katz v. United States*.[131]

D. Concurring Opinion

Justice Kagan, joined by Justices Ginsburg and Sotomayor, wrote to emphasize that the police violated both Mr. Jardines' property rights and his privacy rights.[132] Mr. "Jardines' home was his property," but "it was also his most intimate and familiar space" and was protected by heightened privacy expectations.[133] The concurring opinion determined that the police infringed on Mr. Jardines' privacy because they employed "a super-sensitive instrument," i.e., Franky's nose, to detect what was not otherwise noticeable.[134] Justice Kagan concluded that this violated the "reasonable expectation of privacy" standard articulated in *Katz* because the police (literally) "nos[ed] into intimacies [Mr. Jardines] sensibly thought [were] protected from disclosure[.]"[135] Additionally, the concurring opinion reasoned that the use of such technology to see (or in this case to smell) into Mr. Jardines' intimate and private space clearly constituted an invasion of privacy consistent with the decision in *Kyllo v. United States*.[136] Justice Kagan likened Franky's advanced olfactory abilities to *Kyllo*'s thermal-imaging device.[137] She said that drug-sniffing dogs, like advanced thermal-imagers, are technologically advanced instruments not available to the public.[138] Therefore, their use to examine a home without a warrant amounts to an invasion of privacy.[139] Justice Kagan summed up her concurring opinion by reemphasizing that an inclusion of the *Katz* privacy analysis strengthened the majority's property approach and easily resolved the case.[140]

E. Dissenting Opinion

In his dissent, Justice Alito, joined by the Chief Justice and Justices Kennedy and Breyer, contended that the police neither violated Mr. Jardines' property rights by approaching his front door, nor his privacy

130. *Id.*
131. *Id.* at 1417.
132. *Id.* at 1418 (Kagan, J., concurring).
133. *Id.* at 1419.
134. *Id.* at 1418; *see* Kyllo v. United States, 533 US. 27, 34–35, 40 (2001). With this description of Franky's nose and what it could detect, Justice Kagan is no doubt drawing an analogy to the thermal-imager from *Kyllo*. *See infra* notes 137–38 and accompanying text.
135. Jardines, 133 S. Ct. at 1418 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).
136. *Id.* at 1418–19.
137. *Id.* at 1419.
138. *Id.*
139. *Id.*
140. *Id.* at 1420.

rights by using a dog to sniff for narcotics.[141] Justice Alito found no evidence of trespass because he claimed the police officers' behavior did not deviate from either the implied license to approach a home or *Kentucky v. King*'s[142] "knock and talk" rule.[143] Justice Alito noted that the rule from *King* granted police officers an implied license to approach homes.[144] He also noted that, according to *King*, the police do not engage in a search when they walk up to front doors, even if they approach solely to gather evidence.[145] The dissenting opinion contended therefore that Detective Bartelt and Franky "did not exceed the scope of the license to approach" because they did not deviate from the license's established "spatial and temporal limits."[146] By approaching Mr. Jardines' home during the day, staying on the front yard's paved walkway, and only remaining on the property for a few minutes, the dissenting opinion found that the police did not do anything forbidden under *King*'s knock and talk rule or limited by the common law license to approach.[147] Justice Alito accused the majority of distorting the law to comport with its desired result and claimed that Anglo-American common law lacked any support whatsoever for their contentions.[148]

The dissent also dismissed Justice Kagan's claim that Franky was a unique technology whose use intruded on privacy rights.[149] Justice Alito claimed that law enforcement has been using dogs and their sense of smell for centuries.[150] He asserted that such use in no way violated Mr. Jardines' reasonable expectation of privacy because a reasonable person would be aware that the police use drug-sniffing dogs, and would assume that odors may emanate from a dwelling and spread to areas freely accessible to the public.[151] Thus, Justice Alito found no infringement on reasonable expectations of privacy and therefore no illegal search or Fourth Amendment violation.[152]

III. ANALYSIS

The Supreme Court decided *Florida v. Jardines* by determining that the police dog's sniff search on the front porch—an area well within established curtilage—constituted a trespass under property law and therefore an illegal search in violation of the Fourth Amendment.[153] Although

141. *Id.* at 1426 (Alito, J., dissenting).
142. Kentucky v. King, 131 S. Ct. 1849 (2011).
143. *Jardines*, 133 S. Ct. at 1423; *King*, 131 S. Ct. at 1862.
144. *Jardines*, 133 S. Ct. at 1423.
145. *Id.*
146. *Id.* at 1422–23.
147. *Id.*
148. *Id.* at 1420–21.
149. *Id.* at 1425.
150. *Id.*
151. *Id.*
152. *Id.* at 1426.
153. *See id.* at 1414–16 (majority opinion).

Jardines' outcome differed from many of the Court's other dog-sniff cases, it did not overrule those previous holdings.[154] Despite *Jardines* finding in favor of the individual,[155] its easily distinguishable facts and distinct doctrinal approach ensure the continued viability of cases like *Place*, *Caballes*, and *Scott*.[156] Although Justice Kagan's analysis, if adopted by the majority, would not have upset *Place* or *Caballes*, its emphasis on privacy doctrine would have provided a broader examination of critical Fourth Amendment issues and probably overturned cases like *Scott*. Therefore, in order to provide the most robust Fourth Amendment search protections, the majority should have adopted Justice Kagan's approach and supplemented its property analysis with privacy considerations. Instead, the majority's decision to focus solely on property and trespass law raises concerns with the future application of privacy rights in Fourth Amendment cases. *Jardines*' purposeful neglect of the *Katz* standard leaves unanswered critical questions concerning what level of privacy an individual can expect in his or her dwelling and jeopardizes the Fourth Amendment rights of many of this country's citizens. Although the Court's decision was technically a victory for Mr. Jardines, *Jardines* fails to overturn questionable prior decisions or apply and ensure that the longstanding privacy doctrine maintains its importance in Fourth Amendment analysis.

A. Jardines *Does Not Overrule* Place, Caballes, Scott, *or Other Similar Dog-Sniff Cases*

Contrary to *Illinois v. Caballes* and *United States v. Scott*, *Florida v. Jardines* found in favor of the individual claiming a Fourth Amendment violation.[157] *Jardines* achieved this result by focusing on the fact that the search occurred in a constitutionally protected location and by employing property law instead of privacy doctrine.[158] However, *Jardines* did not invalidate the privacy approach taken by *Place*, *Caballes*, and *Scott*, nor did it overrule their holdings.[159] *Jardines* is therefore best understood as a

154. First, *Jardines* makes no mention in its opinion about overruling prior case law. Second, the facts and situation in *Jardines* are not analogous to the facts from other cases because those cases did not concern privately owned homes surrounded by curtilage. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010) (concerning rented apartments without curtilage or property rights).

155. *See Jardines*, 133 S. Ct. at 1417–18 (concluding that the police engaged in an illegal search and affirming Florida's Supreme Court ruling in favor of Mr. Jardines).

156. *Compare Jardines*, 133 S. Ct. at 1414–15 (examining curtilage rights and private homes), *with* Illinois v. Caballes, 543 U.S. 405, 406–09 (2005) (looking at automobiles on public roads), United States v. Place, 462 U.S. 696, 697–700 (1983) (involving luggage in airports), *and Scott*, 610 F.3d at 1012, 1016 (concerning apartments where the residents are not protected by property rights).

157. *See Caballes*, 543 U.S. at 409; *Scott*, 610 F.3d at 1018. The Court in *Place* ruled in favor of the individual, but absent an improper seizure—"the seizure of respondent's luggage was unreasonable under the Fourth Amendment"—would not have done so. *Place*, 462 U.S. at 707, 710 ("Therefore, we conclude that . . . exposure of respondent's luggage . . . to a trained canine [] did not constitute a 'search' within the meaning of the Fourth Amendment.").

158. *Jardines*, 133 S. Ct. at 1417–18.

159. *Id.* at 1414.

location-specific refinement of the dog-sniff doctrine that *Place* and related cases advanced.

Place held that a warrantless dog sniff did not violate the Fourth Amendment.[160] The Court, using *Katz*'s reasonable expectation of privacy test, determined that the dog sniff in question was not an unreasonable invasion of privacy because it occurred in the very public realm of an airport and because the sniff search did not expose the private contents of the suitcase for public display.[161] *Jardines* held that a dog sniff was unconstitutional, but the critical difference between the two cases is that in *Jardines* the sniff occurred within the home's curtilage boundaries and violated property rights.[162] The majority in *Jardines* determined that unlike a dog sniff of a suitcase in a public airport, which implicated privacy doctrine, a sniff search occurring within the boundaries of curtilage implicated property law and activated Fourth Amendment protections.[163] However, *Jardines*' use of different doctrinal analysis does not void the constitutionality of dog sniffs aimed at luggage or reverse *Place*'s holding. Rather, it highlights the underlying factual differences between the two cases and demonstrates the different possible outcomes when using property law and privacy-rights analysis.

The Court in *Caballes* found that police use of a narcotics dog did not violate Fourth Amendment protections when the dog sniffed the exterior of an automobile that had been lawfully pulled over on a public road.[164] The public and exposed location was critical to the Court's conclusion, as was the fact that the dog sniff only revealed the presence of contraband.[165] Because open roads do not hide a vehicle or its occupant, and because there is no right to possess contraband, the Court concluded that a dog sniff of the exterior of a car did not violate the driver's reasonable expectation of privacy.[166] *Caballes*, like *Place*, relied on privacy doctrine and remains good law because its facts do not align with *Jardines*' or allow for application of a similar property analysis.[167]

Jardines does not upset the Supreme Court's general dog-sniff jurisprudence, epitomized by *Place* and *Caballes*, nor does it upset the lower courts' decisions about dog sniffs aimed at multi-unit dwellings.[168] This is because the Court in *Jardines* emphasized location and focused on the fact that the police trespassed and illegally searched for drugs from within the curtilage.[169] The facts from the prior apartment cases are

160. *Place*, 462 U.S. at 707.
161. *Id.* at 706–07.
162. *Jardines*, 133 S. Ct. at 1414.
163. *Id.* at 1414–16.
164. Illinois v. Caballes, 543 U.S. 405, 410 (2005).
165. *Id.* at 409–10.
166. *Id.*
167. *Id.* at 408–09.
168. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1016 (8th Cir. 2010).
169. Florida v. Jardines, 133 S. Ct. 1409, 1415–16 (2013).

not analogous; the courts have held that the Fourth Amendment does not protect hallways and common areas of multi-unit residences, and that the police do not trespass or exceed the scope of their license to approach when they enter those areas.[170] Not only do apartments and similar dwellings lack protection from trespass, but also their openness and close proximity diminish residents' privacy expectations both inside the dwelling and in hallways and common areas outside.[171] *Jardines*, with its different fact pattern, does not overrule prior apartment cases or question their holdings.[172] However, *Jardines* did present the Court with an opportunity to reevaluate the dubious holdings and privacy analyses of those older cases. The fact that the Court did not seize the opportunity to do so is a serious oversight and shortcoming that leaves the *Jardines* ruling lacking in critical analysis.

B. The Majority's Analysis Is Insufficiently Developed

Justice Scalia wrote that his use of trespass law "keeps easy cases easy."[173] This sentiment might explain why the majority's opinion is oversimplified and under-inclusive. Trespass law is only one way to decide Fourth Amendment cases[174] and its tenets are often debatable.[175] *Jardines*' facts may arguably lend themselves to a straightforward, "baseline[,] . . . [and] easy"[176] application of trespass law, but contrary to the majority's contention, the Court should have also engaged in a privacy analysis.[177] Privacy rights are crucial to a complete Fourth Amendment analysis.[178] Especially because the home is an area of heightened privacy protections,[179] the majority should have supplemented its property law analysis with an examination of privacy expectations. Justice Scalia readily admits that "[a]t the Amendment's 'very core' stands 'the right . . . to retreat into [your] own home and there be free from unreasonable governmental intrusion.'"[180] To be free from intrusion is precisely what it means to have privacy, and therefore the home—the most

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170. *See supra* note 73 and accompanying text.

171. *Id.*

172. *See supra* notes 154, 156 and accompanying text.

173. *Jardines*, 133 S. Ct. at 1417.

174. *Id.* at 1414. Justice Scalia noted that property and trespass law is one way—but not the only way—to address Fourth Amendment violations. *Id.* He acknowledged that the *Katz* privacy standard "add[s] to the baseline" of the Fourth Amendment's protections. *Id.*

175. *See, e.g.*, *id.* at 1420–24 (Alito, J., dissenting).

176. *Id.* at 1417 (majority opinion).

177. *Id.* ("[W]e need not decide whether the officers[] . . . violated [Mr. Jardines'] expectation of privacy under *Katz*.").

178. *See* Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 649 (Cal. 1994) ("[T]he right to privacy [is] 'an important American heritage and essential to the fundamental rights guaranteed by the . . . Fourth . . . Amendment[] to the U.S. Constitution.'"); *see supra* note 28 and accompanying text.

179. Serr, *supra* note 6, at 593.

180. *Jardines*, 133 S. Ct. at 1414 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

highly private locus[181]—is deserving of the greatest Fourth Amendment protections and a thorough application of privacy doctrine.[182] The majority's purposeful disregard of *Katz* and privacy renders its opinion incomplete and fails to extend search protections to all citizens. Had the majority employed a privacy analysis, the Court could have ensured equal application of the Fourth Amendment for all citizens by reasserting that the home, no matter what its physical or structural characteristics, receives the greatest Fourth Amendment protections.

Justice Kagan, noting that privacy interests would have just as easily decided this case, filled the majority's void.[183] She argued that the Miami-Dade Police Department violated Mr. Jardines' reasonable expectation of privacy when it used a trained narcotics dog to "reveal within the confines of a home what they could not otherwise" have observed.[184] To reach this conclusion, Justice Kagan appropriately based her privacy analysis off the Court's decision in *Kyllo*.[185] She accurately compared *Jardines'* narcotic-sniffing dog to *Kyllo*'s thermal-imager, noting that drug-sniffing dogs are highly specialized pieces of equipment unavailable to the public. [186] The concurring opinion concluded that the use of such technology to smell into an individual's home violated a reasonable expectation of privacy just like the use of a thermal-imager to see into the home violated reasonable privacy expectations.[187]

Additionally, Justice Kagan's opinion impliedly acknowledged the important distinction between the target of a search and the location of a search.[188] *Kyllo* explained that the search's target ought to be examined because it may have privacy rights associated with it.[189] Contrarily, *Jones* held that it was only necessary to determine if a trespass occurred at the search's location, and concluded that there was no need to examine whether the search's target was entitled to a reasonable expectation of privacy.[190] Justice Kagan's concurring opinion in *Jardines* rightly applied *Kyllo*'s approach. It considered the search's target and explained that there is the presumption that when the police target a residence—or even "the entrance to [a dwelling]"—privacy rights apply and the protections of the Fourth Amendment are in full force.[191] By adopting *Kyllo*'s approach and rationale, Justice Kagan realized and emphasized the im-

181. *Id.*
182. *See id.*
183. *Id.* at 1418 (Kagan, J., concurring).
184. *Id.* at 1419.
185. *Id.*
186. *Id.*
187. *Id.*
188. *See id.* at 1418.
189. *See* Kyllo v. United States, 533 U.S. 27, 33–34, 40 (2001).
190. United States v. Jones, 132 S. Ct. 945, 950 (2012).
191. *Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring) (quoting *Kyllo*, 533 U.S. at 40) (internal quotation marks omitted).

portance of including a privacy-rights analysis when deciding Fourth Amendment search cases.[192]

Jardines' majority should have examined the *Katz* doctrine and *Kyllo*'s privacy analysis because both are relevant when examining Fourth Amendment protections for the home. Thankfully, Justice Kagan's concurring opinion picked up where the majority left off, managed to provide a straightforward application of privacy doctrine, and made "an 'easy cas[e] easy' twice over."[193] Although the majority's property and trespass approach upheld Fourth Amendment rights, the holding is incomplete because of the failure to adequately address all of the critical elements of a Fourth Amendment case. As a result, the majority runs the risk that *Jardines* will eventually come to signify that the privacy analysis is of secondary importance or that its examination is only required if the trespass standard is not met.[194]

C. The Majority's Holding Is Problematic Because It Raises Practical and Social Concerns and Potentially Limits Critical Constitutional Protections

Jardines held that the police conducted an illegal search, but the opinion does not strengthen Fourth Amendment protections. The majority's decision to pursue only a property and trespass analysis threatens to diminish *Katz*'s longstanding and critical privacy doctrine. As a result, Justice Scalia may have taken an "easy"[195] case and "produce[d] inferior law."[196] By refusing to examine whether Mr. Jardines had a reasonable expectation of privacy at the doorstep of his home, the Court created two problems. First, its narrow focus on property law produced uncertainty and practical problems with future application of Fourth Amendment protections for residences. Second, by failing to examine privacy rights and address the implications and holdings of the lower courts' prior dog-sniff cases, the Court perpetuated a troubling application of Fourth Amendment jurisprudence that fails to apply constitutional protections equally to all individuals.

1. Practical Questions Are Left Unanswered

The majority's singular focus on property and trespass law created a narrow holding that will be difficult to apply in future cases when dog sniffs are aimed at a home. For example, what if, instead of Franky sniffing from Mr. Jardines' front porch, he was an extraordinarily talented

192. *Id.* at 1419–20.

193. *Id.* at 1420 (alteration in original) (quoting *id.* at 1417 (majority opinion)).

194. In fact, *Jardines* is the second Supreme Court decision in as many years to ignore a privacy analysis in favor of the old property and trespass standard. *United States v. Jones*, 132 S. Ct. 945, 949 (2012), is the other case decided using property rights. Therefore, *Jardines* could be interpreted as reinforcing this trend.

195. *Jardines*, 133 S. Ct. at 1417 (majority opinion).

196. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

drug-sniffing dog and could detect odors from the street? Or, what if technology advances to the point where it becomes possible to conduct drug searches of homes from public areas? *Kyllo* might provide some guidance,[197] but *Place* and *Caballes* might contravene *Kyllo*.[198] Because there is no reasonable expectation of privacy in contraband,[199] and because a drug-dog's sniff search would only reveal drugs, those questions become complicated. Regardless of what their answers might be, and although the home would still be the target of the search, the change in location from where the police conduct the search would render *Jardines*' narrow focus on property and trespass law incapable of providing answers. Justice Kagan's privacy-rights framework would be much better suited to tackling those complex questions and is certainly easier to apply when the facts from other cases do not exactly align with those from *Jardines*.[200]

Another problem with the majority's opinion is that its analysis only relied on the physical characteristics of Mr. Jardines' property.[201] Mr. Jardines was only afforded Fourth Amendment protection in this case because he lived in a single-family detached house with a front porch and a surrounding yard.[202] Consequently, the majority's fact-specific analysis cannot answer what would have happened had Mr. Jardines been living in an apartment when the police brought a drug-dog to his front door. Certainly a curtilage analysis would be inapplicable, and a trespass analysis would fail to address the Fourth Amendment's critical privacy concerns and seemingly guarantee victory for the state.[203] However, a privacy analysis could resolve whether the police officers' search violated the Fourth Amendment. Yet, the majority in *Jardines* purposely avoided discussing privacy rights.[204] Would a dog sniff search of an apartment from outside its door be permissible? Many older cases hold that it would be.[205] But, even though *Jardines* emphasized a residence's special protected status,[206] the majority's analysis cannot answer whether apartments—despite also being places of residence—would be afforded similar heightened protections.

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197. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001). *Kyllo*'s facts are similar to that hypothetical, and the Court held that a thermal-imager used from a public road to peer into a home was an unconstitutional invasion of privacy rights. *Id.* at 40.

198. Both cases held that sniffs by drug-dogs in public areas did not violate reasonable expectations of privacy because they did not reveal intimate details otherwise hidden from public view. *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005); United States v. Place, 462 U.S. 696, 707 (1983).

199. *Caballes*, 543 U.S. at 408.

200. *See* Jardines, 133 S. Ct. at 1418–20 (Kagan, J., concurring).

201. *Id.* at 1414 (majority opinion).

202. *Id.*

203. *See supra* note 73.

204. *Jardines*, 133 S. Ct. at 1417 (noting that "we need not decide . . . expectation of privacy . . . .").

205. *See supra* note 73.

206. *Jardines*, 133 S. Ct. at 1414–15.

Jardines' narrow and fact-specific decision is therefore only relevant to cases with nearly identical facts and does not adequately advance Fourth Amendment interpretation. As a result, it produces no broadly applicable rule and provides only limited guidance. Broader holdings and definitions of *search* are generally better because they are "fairer, more regular, [and] more constitutionally reasonable . . . [and because they] reduce[] the opportunities for official arbitrariness, discretion, and discrimination."[207] By failing to provide a broadly applicable interpretation of Fourth Amendment rights for when dog sniffs are aimed at dwellings, *Jardines* leaves lower courts largely without guidance when faced with similar but not easily comparable cases.

2. Social and Constitutional Concerns

The second major problem with the majority's analysis is that it did not adequately address the privacy rights inherent to all places of residence[208] or consider their impact on a dwelling regardless of its physical or economic nature. This lack of a privacy analysis allows for the perpetuation of troubling constitutional inequalities and threatens to limit application of *Katz*'s reasonable expectation of privacy standard.

Although the majority recognized that at the "very core" of the Fourth Amendment stands an individual's right to retreat into the home and "there be free from unreasonable governmental intrusion,"[209] its opinion did not extend that protection to all citizens. Under Justice Scalia's property analysis, only citizens living in places with curtilage—i.e., most privately owned single-family homes—are afforded Fourth Amendment protection from police dogs sniffing for narcotics.[210] Unlike *Kyllo*, which was decided based on the target of the search,[211] the Court relied on the location of the search in *Jardines*.[212] Justice Scalia reasoned that the police violated Mr. Jardines' Fourth Amendment rights because they searched from a specific location—his front porch.[213] However, the Court should have decided *Jardines* by examining the target of the

207. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 809 (1994).

208. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001); United States v. Thomas, 757 F.2d 1359, 1366 (2d Cir. 1985).

209. *Jardines*, 133 S. Ct. at 1414 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).

210. *Id.* at 1416.

211. *See Kyllo*, 533 U.S. at 34. *Kyllo* was decided based on the target of the search. *Id.* Because the target was the home, and the Fourth Amendment affords the greatest protection to the home, the Court deemed the search illegal. *Id.* Because the police did not commit a trespass, the search's location was irrelevant, and it would not have made any difference had the police used the thermal-imager from an airplane, satellite, or the neighbor's house next door. *Id.*

212. *Jardines*, 133 S. Ct. at 1416–17.

213. *Id.* at 1417 ("Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. . . . That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.").

search, which is what Justice Kagan's concurring opinion advocated. That is, the Court should have decided the case based on the fact that the police searched Mr. Jardines' home.

Justice Scalia's narrow focus on location instead of target risks diminishing the Fourth Amendment rights of citizens who do not live in stand-alone houses.[214] When the police aim searches at the home, the courts often determine the applicability of Fourth Amendment protections by looking at the dwelling's physical characteristics.[215] Because of this, structure becomes a decisive factor in the level of protection afforded to individuals, and Fourth Amendment rights become highly correlated to economic class.[216] This results in an application of the Fourth Amendment that favors those who have the financial ability to afford private homes.[217] This, in turn, offers wealthier citizens greater protection than poorer citizens.[218] "Privacy follows space . . . people with money have more space than people without" and therefore are granted the heightened privacy protections that go along with their additional space and curtilage.[219] Poorer and younger people generally are unable to afford private homes and more often live in apartments.[220] As a result, they do not have curtilage or property rights and the Fourth Amendment does not prohibit the police from conducting searches at their front doors.[221]

This ensuing disparity in Fourth Amendment protections is cause for concern. The Fourth Amendment should not "protect[] only those persons who can afford to live in a single-family residence with no surrounding common space."[222] Instead, the Fourth Amendment must protect all people from unwarranted governmental intrusion.[223] Failure to provide such protection would grant greater Fourth Amendment protections to those "who are more financially successful,"[224] those who are older, those with a larger family, those who are less transient, and those who do not live in a high-density urban environment. The text of the Fourth Amendment does not differentiate between property owners and renters or between single-family homes and multi-unit dwellings; it affords all people the same level of protection from governmental intrusion.[225] *Jardines*, by failing to focus on the target of the search—the home—and instead basing its ruling on the location of the search—the

214. *See* Mayer, *supra* note 2, at 1045.
215. *See supra* note 73.
216. Mayer, *supra* note 2, at 1045.
217. *Id.*
218. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999).
219. *Id.* at 1270.
220. *Id.*
221. *See supra* note 73.
222. United States v. Roby, 122 F.3d 1120, 1127 (8th Cir. 1997) (Heaney, J., dissenting).
223. Mayer, *supra* note 2, at 1045.
224. *Id.*
225. *Id.*; U.S. CONST. amend. IV.

curtilage—improperly shifts the focus of Fourth Amendment protections and threatens to greatly diminish the cherished, heightened, and long-established privacy rights that accompany homes.[226] At least in this and similar contexts, the target of the search is more important than the location from which it occurs. After all, the Fourth Amendment does not protect places; it protects people and objects.[227]

Jardines' failure to address privacy concerns and extend full Fourth Amendment protections to all citizens regardless of what type of home they live in has serious constitutional ramifications. It also creates bad law and propagates the unfortunate precedent of limiting Fourth Amendment privacy analysis. Although fluidity and flux often characterize the Fourth Amendment,[228] *Jardines* strays too far by totally neglecting privacy analysis. Trespass law, while certainly a traditional and valid means of determining whether an illegal search has occurred, "need[s] to be supplemented to deal with" the privacy concerns brought on by new technology (such as drug-dogs) and changing social norms.[229] Justice Scalia may contend that *Katz* is still good law,[230] but *Jardines* makes it unclear whether he and several other Justices think it is important or applicable. What is clear is that a potential result of limiting privacy doctrine, and of propagating bad law in general, is that courts may simply avoid addressing rights deemed unworthy of careful diagnosis.[231] *Jardines* risks advancing "a rule that is unrepresentative" of how future cases should be decided, and "distort[s] . . . the nature of [the] controvers[y]" concerning Fourth Amendment search analysis.[232]

CONCLUSION

Florida v. Jardines reached the right result but should have taken a different approach to get there. The Court correctly concluded that the police engaged in an unlawful search, but the opinion unfortunately relied on property and trespass law instead of *Katz*'s reasonable expectation of privacy standard.[233] The majority's specific and unapologetic dismissal of *Katz*'s critical privacy considerations[234] resulted in a failure to overrule questionable cases, did not create a clear and broadly applicable rule, and perpetuated a standard that allows for an unequal application of Fourth Amendment protections. Furthermore, by relegating *Katz*'s privacy analysis to a secondary position behind a property analy-

226. *See* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

227. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated . . . ."); Katz v. United States, 389 U.S. 347, 351 (1967).

228. *See* Amar, *supra* note 207, at 757–58.

229. *Id.* at 798.

230. *Jardines*, 133 S. Ct. at 1417.

231. Marceau, *supra* note 15, at 755.

232. Schauer, *supra* note 196, at 900, 905.

233. *Jardines*, 133 S. Ct. at 1417.

234. *Id.*

sis, the Court is potentially signaling that privacy rights are of diminished significance or that their analysis is unnecessary. Although Justice Kagan's concurring opinion reminds us that *Katz* and privacy rights are as important as ever and could have easily decided *Jardines*,[235] her opinion does not set the legal standard.

Jardines' trespass analysis rightly reaffirms the home's unique and highly protected status and ensures that residents are free from government searches that violate property interests.[236] However, segregation of property and privacy doctrine within the realm of the Fourth Amendment "forecloses consideration of the totality of a police-citizen interaction."[237] Consequently, "the quality of the resultant constitutional rights" is negatively impacted.[238] *Florida v. Jardines* is an example of this phenomenon. The Fourth Amendment may have originally relied solely on property and trespass law,[239] but analysis today requires examination of the reasonable expectation of privacy standard.[240] After all, as the Second Circuit in *United States v. Thomas*[241] concluded, "[t]he very fact that a person is in his own home raises a reasonable inference that he intends to have privacy."[242] The *Jardines* decision may protect the home from trespass and inappropriate physical intrusions, but it does not include the necessary analysis required to definitively address and answer Fourth Amendment privacy concerns. More troubling still, the *Jardines* decision does not ensure that the same rights are available to all citizens regardless of the physical or structural nature of their residence.

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235. *Id.* at 1418–20 (Kagan, J., concurring).
236. *Id.* at 1417 (majority opinion).
237. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 464 (2012).
238. *Id.* at 409.
239. *Jardines*, 133 S. Ct. at 1414.
240. Serr, *supra* note 6, at 587–89.
241. 757 F.2d 1359 (2d Cir. 1985).
242. *Id.* at 1366 (alteration in original) (quoting United States v. Taborda, 635 F.2d 131, 138 (2d Cir. 1980)) (internal quotation mark omitted).

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